

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1912.

No. 2442.

936

CHESAPEAKE & POTOMAC TELEPHONE COMPANY, A
CORPORATION, APPELLANT,

vs.

DISTRICT OF COLUMBIA AND CHARLES C. ROGERS, COL-
LECTOR OF TAXES OF THE DISTRICT OF COLUMBIA.

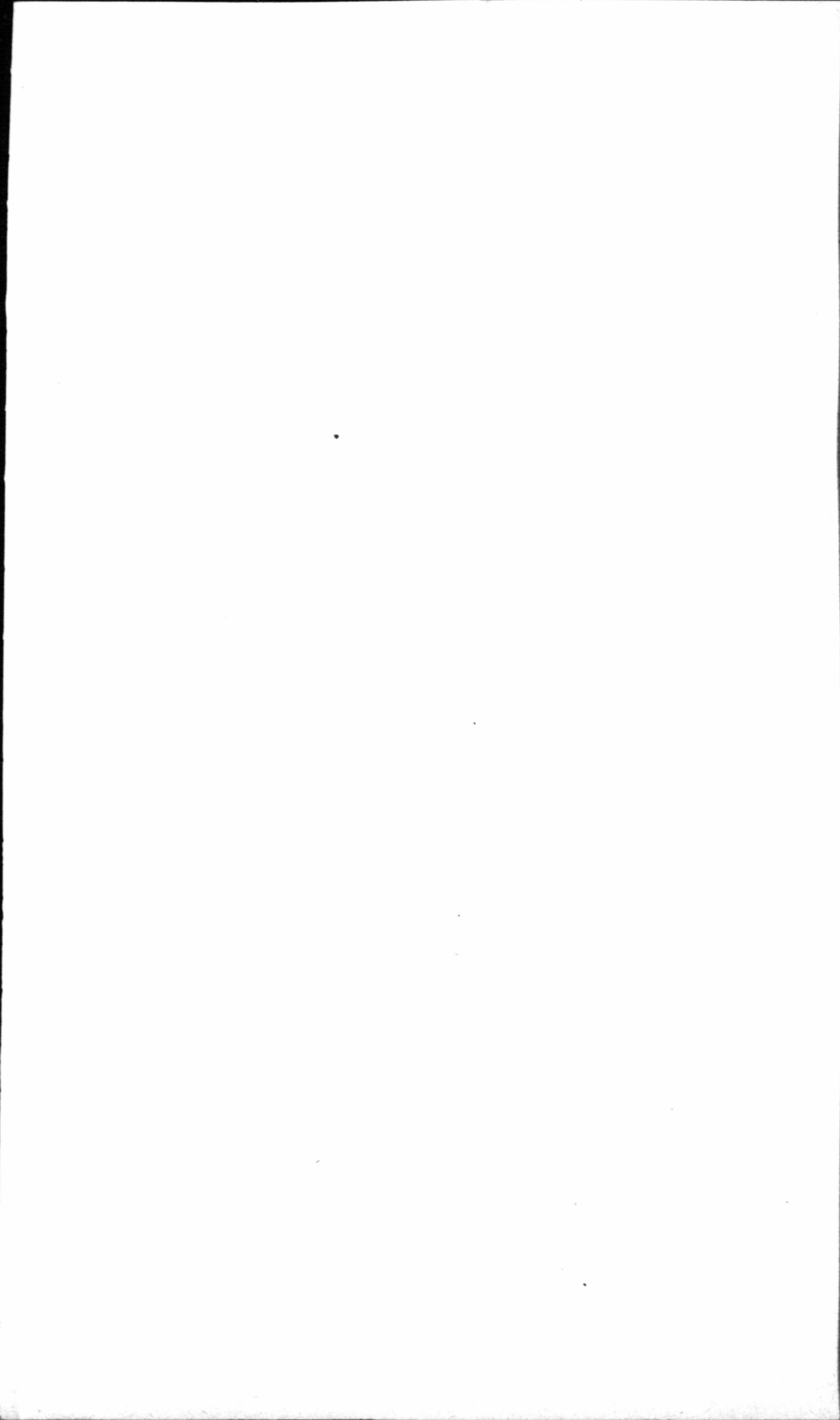
APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1912.

No. 2442.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY, A
CORPORATION, APPELLANT,

vs.

DISTRICT OF COLUMBIA AND CHARLES C. ROGERS, COL-
LECTOR OF TAXES OF THE DISTRICT OF COLUMBIA,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2442.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation,
Appellant,

vs.

DISTRICT OF COLUMBIA et al.

a Supreme Court of the District of Columbia.

At Law. No. 53823.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation,
Plaintiff,

vs.

DISTRICT OF COLUMBIA and CHARLES C. ROGERS, Collector of Taxes
of the District of Columbia, Defendants.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration as Amended.*

Filed May 25, 1912.

In the Supreme Court of the District of Columbia.

At Law. No. 53823.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY, a Corporation,
Plaintiff,

vs.

DISTRICT OF COLUMBIA and CHARLES C. ROGERS, Collector of Taxes
of the District of Columbia, Defendants.

1. The plaintiff, the Chesapeake and Potomac Telephone Company, is and was prior to June 1, 1910, a corporation organized and

1—2442a

existing under the laws of the State of New York and was then and had been for a long time prior thereto engaged in business as a telephone company in the District of Columbia. The defendant, the District of Columbia, on said last mentioned date and prior thereto was a municipal corporation under and by virtue of the laws of the United States and the defendant Charles C. Rogers was and had been for many years prior thereto, Collector of Taxes of the District of Columbia. On said last mentioned date there was and there now is in force in said District of Columbia a law of the United States providing that all telephone companies, through their proper officers, shall make affidavit to the Board of Personal Tax Appraisers of said District on or before the first day of August

2 of each year, as to the amount of their gross earnings for the preceding year ending the 30th day of June, and shall annually pay to the Collector of Taxes for the District of Columbia, a tax on such gross earnings of four per centum (4%) thereof, and that the said tax shall be paid on or before the first day of June of the year succeeding the date provided for the making of such affidavit to the said Board as aforesaid.

Prior to July 1, 1910, the Assessor of Taxes of the District of Columbia, caused to be prepared and printed blank schedules for personal property subject to taxation as required by the act of Congress of July 1, 1902, imposing a tax on personal property in the District of Columbia (32 Stat. at L. 590). The blank schedules were dated July 1, 1910. Thereupon the Assessor caused to be printed and published on June 29, June 30 and July 1, 1910, in certain newspapers printed and published in the City of Washington, District of Columbia, a notice that such schedules had been prepared and that a copy of such schedules would be delivered to any citizen applying therefor at his office; and the notice further stated that the law required such schedules to be properly filled out, sworn to and returned to the Assessor within thirty days after the date of the last publication of the notice, and further that the return must be made on or before August 1, 1910, and that the law would be strictly enforced by the Board of Personal Tax Appraisers.

3 The plaintiff did not fill out, swear to and return one of said schedules, nor did it make affidavit to the said Board on or before the first day of August, 1910, as to the amount of its gross earnings for the preceding year ending June 30, 1910. In January, 1911, a copy of one of said schedules was sent by the clerk of the Board of Personal Tax Appraisers to the plaintiff, and on January 20, 1911, the said clerk by letter notified the plaintiff that the same had been sent to it for the reason that the plaintiff had failed to make return in July, 1910, for gross earnings for the year ending June 30, 1910.

On January 25, 1911, the plaintiff by its assistant secretary filed with the said Board of Personal Tax Appraisers an affidavit duly subscribed and sworn to, bearing said last mentioned date, in which it was stated that the gross earnings of the plaintiff company for the year ending June 30, 1910, were \$1,302,989.60. Said affidavit was contained in and attached to one of said printed schedules. The said

affidavit of January 25, 1911, was accepted by the said Board of Personal Tax Appraisers as a correct return of the amount of said gross earnings of the plaintiff, and neither the said Board of Personal Tax Appraisers, nor any other official of the District of Columbia, made any investigation or inquiry as to the amount of such gross earnings other than to request the plaintiff to make a return as aforesaid. No notice of the rejection of said affidavit of January 25, 1911, was given to the plaintiff by the said Board of Personal Tax

4 Appraisers under the second proviso of paragraph 1 of section 6 of the said act of Congress of July 1, 1902, or otherwise. Neither of the defendants suffered or sustained any pecuniary loss, damage or injury by reason of the failure of the plaintiff to make said affidavit or return on or before August 1, 1910.

Subsequently to March 1, 1911, and not before, a final list of persons or corporations and property subject to tax under said act of Congress of July 1, 1902, was made up by said Board of Personal Tax Appraisers, in which said list the said Board caused an entry to be made consisting of the name of the plaintiff company and the words and figures "\$1,563,587.52 assessed value; \$62,543.50 tax." No other assessment of a tax against the plaintiff on account of its said gross earnings for the year ending June 30, 1910, was made or attempted to be made by said Board or by any other tax official, or by the defendant the District of Columbia.

Thereafter, namely, on May 1, 1911, a printed card was sent by the defendant Rogers, as Collector of Taxes of the District of Columbia, to the plaintiff which read as follows:

"Your attention is called to the personal tax assessment of \$62,543.50 assessed to you for the year 1911. This tax must be paid during the month of May to avoid penalty.

CHARLES C. ROGERS."

5 On May 29, 1911, the plaintiff tendered to the defendant Rogers, as Collector of Taxes for the District of Columbia, the sum of \$52,119.58 (being four per centum (4%) of \$1,302,989.60, the amount of its gross earnings for the year ending June 30, 1910) in payment of the said tax on its said gross earnings for the said last mentioned year which tax was payable on or before June 1, 1911, by the law, then and now in force. Said tender the defendants rejected and refused on the ground and for the reason that there was also due and owing from plaintiff a penalty of twenty per centum (20%) on the amount of said tax, in addition to said tax.

Thereafter, but subsequent to June 1, 1911, the defendants rendered a tax bill to the plaintiff in the words and figures following, to wit:

"NOTICE.—This bill is for the tax year from July 1, 1910, ending June 30, 1911.

All of tax payable in May, 1911; one per cent. penalty on the first day of June, 1911, and a like penalty on the first day of each succeeding month.

Pay to the Collector of Taxes, D. C.

1911. Personal Tax Year Ending June 30,

1911.

Folio 291.

Chesapeake & Potomac Tel. Co., 722 Twelfth St. N. W., to District
of Columbia, Dr. 4%.

To all of Tax on \$1,563,587.52 Assessed value.....	\$62,543.50
To penalty of One per cent.....	625.44
	\$63,168.94

Received payment,

_____,
Collector, D. C."

6 On June 5, 1911, the defendants demanded of the plaintiff the payment of the sum of \$63,168.94, the total amount of the said alleged tax including a 1% penalty as shown by said tax bill, and said defendant Rogers acting for and in behalf of himself as Collector of Taxes and in behalf of the defendant, the District of Columbia, then and there notified the plaintiff that unless said last mentioned sum of money should be paid at once, he would proceed under the law to collect the same. The plaintiff then and there refused to pay the defendant Rogers or the defendant the District of Columbia on account of said tax any sum in excess of said sum of \$52,119.58 which last mentioned sum it again tendered to the defendant Rogers as Collector of Taxes as aforesaid, which last mentioned tender was then and there rejected and refused by the defendant Rogers in his own behalf as Collector of Taxes as aforesaid, and in behalf of the defendant, the District of Columbia.

Thereafter the said defendant Rogers under directions from his co-defendant, the District of Columbia, did on June 6, 1911, in said District of Columbia, distrain as by law provided in the case of non-payment of delinquent taxes, upon the goods and chattels of the plaintiff in satisfaction of the aggregate amount of said tax upon its said gross earnings and said penalties aforesaid, namely, \$63,168.94 and refused to release the said goods and chattels unless the said plaintiff should then and there pay said last mentioned sum.

7 The plaintiff on June 7, 1911, under coercion of the duress so exercised by means of said distraint and to escape the sale of its said goods and chattels under the said process of distress, and under protest, paid to the defendant Rogers for the use and benefit of his co-defendant, the District of Columbia, the whole of said sum of \$63,168.94 which last mentioned sum the defendants now have and retain in their possession.

And the plaintiff by reason of the premises sues the defendant to recover all of the amount of said alleged penalties so paid by it under protest as aforesaid, to wit, the sum of \$10,423.92 (the difference between the amount of said tax \$52,119.58 and the amount of said tax plus said penalty of twenty per centum (20%) or

\$62,543.50 and \$625.44, the alleged penalty of one per cent on said \$62,543.50, or a total of \$11,049.36, and avers that said alleged penalties were and are illegal and were wrongfully and unjustly and without authority of law imposed and collected as aforesaid.

Wherefore the plaintiff claims of the defendants the said sum of \$11,049.36 with interest thereon from June 7, 1911, and costs of this suit.

2. The plaintiff, the Chesapeake and Potomac Telephone Company, is and was prior to June 1, 1910, a corporation organized and existing under the laws of the State of New York and was then and had been for a long time prior thereto engaged in business as a telephone company in the District of Columbia. The defendant, the

8 District of Columbia, on said last mentioned date and prior thereto was, and now is, a municipal corporation under and by virtue of the laws of the United States and the defendant

Charles C. Rogers was and had been for many years prior thereto and now is Collector of Taxes of the District of Columbia. On said last mentioned date there was and there now is in force in said District of Columbia a statute enacted by Congress on July 1, 1902, providing that all telephone companies shall annually pay to the Collector of Taxes of the District of Columbia a tax on their gross earnings for each and every year ending the 30th day of June and that the said tax shall be paid on or before the first day of June of the year succeeding its imposition.

In March, 1911, the Board of Personal Tax Appraisers created by said act of July 1, 1902, made up a final list of persons or corporations and property subject to tax under said act, in which said list the said Board caused an entry to be made consisting of the name of the plaintiff company and the words and figures, "\$1,563,587.52 assessed value; \$62,643.50 tax." No other assessment of any tax against the plaintiff on account of its gross earnings or for any personal tax due by it for the year ending June 30, 1910, was made or attempted to be made by said Board or by any other tax official or by the defendant, the District of Columbia.

9 Thereafter, namely, on May 1, 1911, a printed card was sent by the defendant Rogers, as Collector of Taxes of the District of Columbia to the plaintiff which was in words and figures, following, to wit:

"Your attention is called to the personal tax assessment of \$62,543.50 assessed to you for the year 1911. This tax must be paid during the month of May to avoid penalty."

CHARLES C. ROGERS."

Thereafter, but subsequent to June 1, 1911, the defendants rendered a tax bill to the plaintiff in the words and figures following to wit:

Pay to the Collector of Taxes, D. C.

1911. Personal Tax Year Ending June 30,

1911.

Folio 291.

Chesapeake & Potomac Tel. Co., 722 Twelfth St. N. W., to District
of Columbia, Dr. 4%.

To all of Tax on \$1,563,587.52 Assessed value.....	\$62,543.50
To penalty of One per cent.....	625.44
	\$63,168.94

Received payment, .

_____,
Collector, D. C."

On June 5, 1911, the defendants demanded of the plaintiff payment of the said sum of \$63,169.94 as shown by said tax bill, and said defendant Rogers acting for and on behalf of himself as Collector of Taxes and in behalf of the defendant, the District of Columbia, then and there notified the plaintiff that unless said last mentioned sum of money should be paid at once, he would proceed under the law to collect the same. The plaintiff then and there refused to pay the said sum of money to the defendant Rogers or to the defendant, the District of Columbia, and thereafter, on, to wit, June 6, 1911, the said defendant Rogers under directions of his co-defendant, the District of Columbia, did distrain as by law provided in the case of non-payment of delinquent taxes, upon the goods and chattels of the plaintiff in satisfaction of said alleged tax of \$63,168.94 and refused to release the said goods and chattels unless the plaintiff should then and there pay the said last mentioned sum. The plaintiff, on June 7, 1911, under coercion of the duress so exercised by means of said distraint and to escape the sale of its said goods and chattels under the said process of distress, and under protest, paid to the defendant Rogers for the use and benefit of his co-defendant, the District of Columbia, the whole of said sum of \$63,168.94 which last mentioned sum the defendants now have and retain in their possession.

And the plaintiff by reason of the premises sues the defendants to recover the said sum of \$63,168.94, said alleged tax, and avers that the same was wrongfully, illegally and without authority of law assessed and imposed upon it and collected as aforesaid.

Wherefore the plaintiff claims of the defendants said sum of \$63,168.94 with interest from June 6, 1911, and costs of this suit.

TUCKER, KENYON & MACFARLAND,
Attorneys for Plaintiff.

Demurrer to Amended Declaration.

Filed May 25, 1912.

* * * * *

Now come the defendants, by their attorney, and demur to the declaration as amended, and to each count thereof, for that:

1. The said declaration discloses no cause of action against the defendants for the recovery of money paid as penalties on the said tax.

2. The penalties imposed on the said plaintiff for failure to pay its taxes within the time required by law were properly imposed and the plaintiff is liable for the same.

3. The said declaration shows no irregularities or illegalities in the assessment of the said tax.

4. The said second count shows at most the mere irregularity in the assessment of the tax complained of but does not attack its validity.

12 5. The said declaration does not disclose, nor does any count thereof disclose, any sufficient reason to justify a recovery by the plaintiff against any of the defendants herein.

E. H. THOMAS,
F. H. S.,
Attorney for Defendants.

Supreme Court of the District of Columbia.

SATURDAY, May 25, 1912.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * *

Upon hearing the demurrer of defendants to the plaintiff's declaration as finally amended, it is considered that said demurrer be, and hereby is, sustained; whereupon the plaintiff elects to stand upon said declaration as finally amended.

Therefore, it is considered that the plaintiff take nothing by its suit, and that the defendants go thereof without day, and recover against the plaintiff their costs of suit to be taxed by the Clerk and have execution thereof.

The plaintiff by its Attorneys in open Court notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars (\$100.).

13

Memorandum.

May 31, 1912.—Appeal bond approved and filed.

Assignments of Error.

Filed June 11, 1912.

* * * * *

The court Below erred in sustaining the demurrer to the declaration as finally amended and rendering judgment for the defendants, in that

As to the first count:

(1) Under a proper construction of paragraph 1 of section 6 of the Act of Congress of July 1, 1902, (32 Stat. at L. 590-629) it was not the duty of the appellant to make return of its gross earnings for the year ending June 30, 1910, upon one of the schedules mentioned therein, nor under said paragraph did the board of personal tax appraisers have any power to assess or attempt to assess against appellant a tax upon said gross earnings for the failure of the appellant to make such return, or to add a 20% penalty thereto.

(2) The sole duty of the appellant under said act of July 1, 1902, was to make a return of its gross earnings for the year ending June 30, 1910, on or before August 1, 1910, as provided by paragraph 5 of section 6 of said act, which section provides no penalty whatever for failure to make such return.

(3) That the tax upon the gross earning- of a telephone company imposed by said act of July 1, 1902, is a franchise tax and not a personal property tax as provided for in paragraph 1 of section 6 of said act of Congress of July 1, 1902, and therefore no return was required to be made by the appellant under said paragraph 1 of its said gross earnings, and the penalty prescribed by said paragraph 1 could not lawfully be imposed upon it for failure to make such return under said paragraph.

(4) That even assuming that it was the duty of the appellant to make return of its gross earnings for the year ending June 30, 1910, under the provisions of paragraph 1 of section 6 of said act of Congress of July 1, 1902, the penalty authorized to be imposed by said paragraph could not lawfully be imposed until the board of personal tax appraisers had first "without delay from the best information they could procure" actually made an assessment; and the first count of the declaration shows that the board of personal tax appraisers made no such inquiry or investigation, and attempted to make no assessment whatever until the appellant made its affidavit on January 25, 1911, which affidavit the said board of personal tax appraisers accepted and used as the basis for their action in attempting to make such assessment.

(5) That assuming that the board of personal tax appraisers had the right to impose a penalty of 20% on the gross earnings of the appellant for the year ending June 30, 1910, it had no right, nor had the appellees, or either of them, the right to impose or attempt to impose a penalty of 1% (as was done) upon the aggregate amount of the alleged tax and 20% penalty, because by such action a penalty was imposed upon a penalty, which is contrary to law.

As to the second count:

(6) That the second count of the declaration shows that no valid assessment was made against the appellant or its property in that the entries in the assessment rolls failed to in any wise describe the property or franchise sought to be assessed, but contained only the name of the appellant and the amount of the attempted assessment.

Designation.

Filed June 11, 1912.

* * * * *

The clerk of the court in preparing the transcript of record on appeal in the above entitled cause, will please include the following:—

1. Declaration as finally amended;
2. Demurrer to declaration as finally amended;
3. Judgment;
4. Memorandum of filing of appeal bond;
5. Assignments of error; and
6. This designation.

TUCKER, KENYON & MACFARLAND,
Attorneys for Plaintiff.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52,823 at Law, wherein Chesapeake & Potomac Telephone Company, a corporation, is Plaintiff and District of Columbia, and Charles C. Rogers, Collector of Taxes of the District of Columbia, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of July, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2442. Chesapeake & Potomac Telephone Company, a corporation, appellant, vs. District of Columbia et al. Court of Appeals, District of Columbia. Filed Jul- 9, 1912. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

SEP.--3-1912

IN THE *Henry W. Hodges.*
Black.

Court of Appeals, District of Columbia

October Term, 1912.

No. 2442.

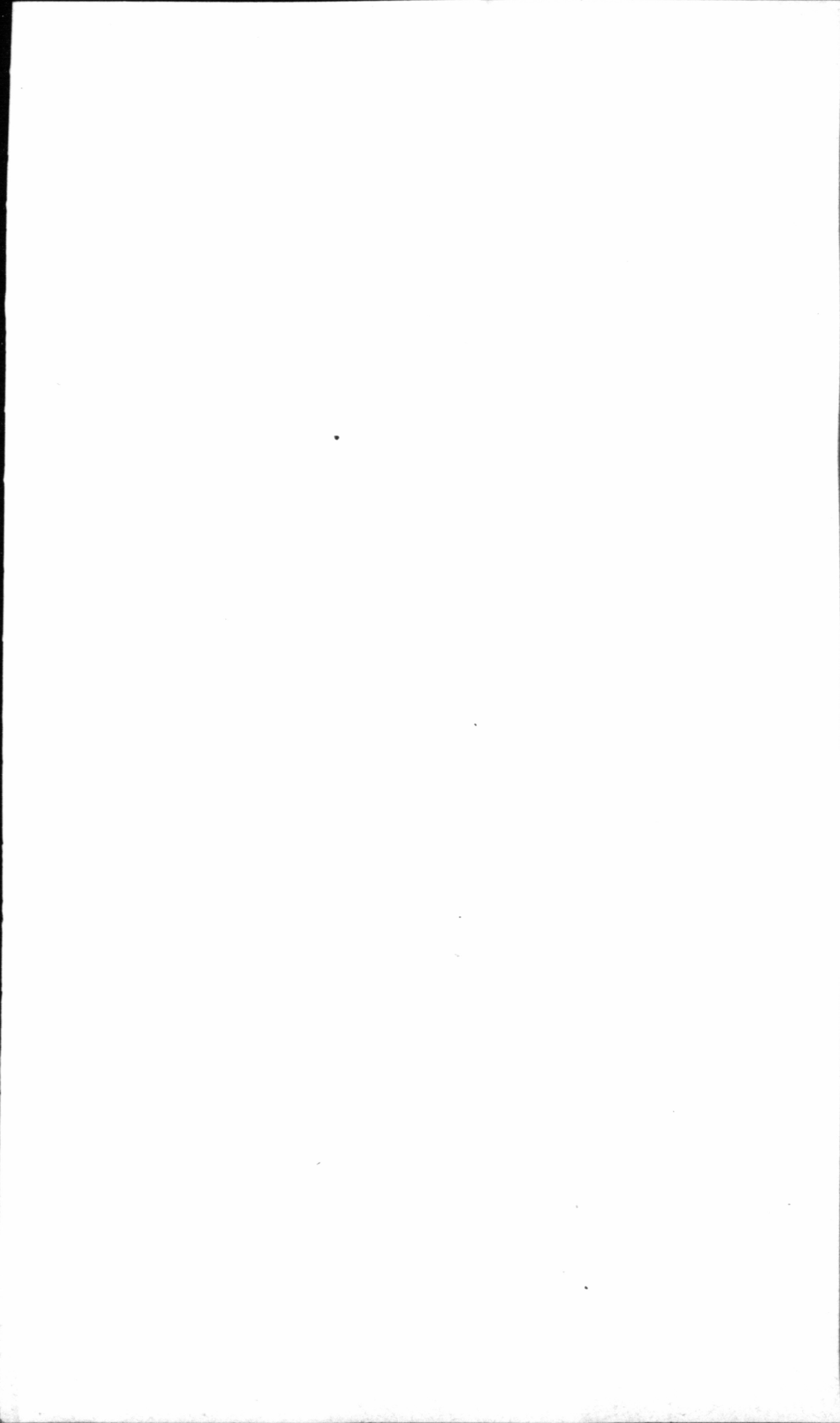
CHESAPEAKE & POTOMAC TELEPHONE COMPANY,
A CORPORATION, *Appellant,*

vs.

DISTRICT OF COLUMBIA AND CHARLES C. ROGERS, COL-
LECTOR OF TAXES OF THE DISTRICT OF COLUMBIA,
Appellees.

BRIEF FOR APPELLANT.

HENRY B. F. MACFARLAND,
CHARLES COWLES TUCKER,
J. MILLER KENYON,
Counsel for Appellant.



IN THE
Court of Appeals, District of Columbia

October Term, 1912.

No. 2442.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY,
A CORPORATION, *Appellant*,

vs.

DISTRICT OF COLUMBIA AND CHARLES C. ROGERS, COL-
LECTOR OF TAXES OF THE DISTRICT OF COLUMBIA,
Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Supreme Court of the District of Columbia, sustaining a demurrer to a declaration, in two counts, for the recovery of penalties and taxes paid under duress and protest, and, the plaintiff electing not to amend, dismissing the action.

The appeal involves the construction of Section 6, of the Act of Congress of July 1, 1902, as amended

April 28, 1904, imposing a tax on personal property, etc., in the District of Columbia (32 Stat., 590, 33 Stat., 563) as applied to the taxation of telephone companies in said District. Paragraph 1 of that Act provides that the assessors shall annually cause to be prepared printed blank schedules of all tangible personal property, and of general merchandise or stock in trade, owned, or held in trust or otherwise, subject to taxation under the provisions of that section, and of the classes of corporations and companies to be assessed, together with the rate of tax prescribed, to which shall be appended an affidavit in blank that the foregoing presents a full and true statement of all such personal property, taxable capital, or other basis of assessment, or either, as the case may be. Provision is made for notice by publication that the schedules are ready for delivery, and for the delivery of a copy to any citizen applying therefor. It is further provided that every person, association, corporation, firm, or company in the District liable to taxation thereunder shall, within thirty days after the last publication of the advertisement, fill out the proper blanks in the schedule with a full and true statement as in the section thereinbefore required and make and sign an affidavit to the truth thereof. Thereupon it is made the duty of the board of personal tax appraisers to "assess said property at its fair cash value," and enter the sum in the column upon the blank provided for that purpose, and the amount thus ascertained "shall be entered upon the books for taxation for the fiscal year beginning July 1st, 1902, and each fiscal year thereafter." Then follows the following proviso:

“Provided, that if any person, firm, association, corporation, company, administrator, executor, guardian, or trustee, shall fail to make and deliver to the assessor or one of the said appraisers, within thirty days after the date of the last advertisement of the notice hereinbefore required the schedule of his or its said personal property owned held in trust or otherwise as provided for in this section, then the said board of personal tax appraisers hereinbefore provided for shall without delay from the best information they can procure make an assessment against such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, to which they shall add twenty per centum thereof.”

Paragraph 5 of the same section provides that:

“ * * * all gas, electric lighting and telephone companies through their proper officers, shall make affidavit to the board of personal tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the Collector of Taxes of the District of Columbia per annum on such gross earnings as follows: Each * * * telephone company, four per centum. And in addition thereto the real estate owned by each * * * telephone company in the District of Columbia shall be taxed as other real estate in said District.”

The Act does not state whether the tax to be paid by telephone companies on their gross earnings is

exclusive of any tax to be paid on their tangible personal property.

Paragraph 18 of the same section imposes a penalty of not exceeding \$500.00 for violating any of the provisions of the section, to be imposed upon conviction in the police court as other fines and penalties are imposed.

By the first count of the declaration it appears that the appellant, a telephone company doing business in the District of Columbia, having failed to make a return of its gross earnings for the year ending June 30, 1910, on or before August 1, 1910, a copy of one of the schedules provided for in paragraph 1, was sent by the clerk of the board of personal tax appraisers in January, 1911, to the appellant, and a few days later the clerk by letter notified the appellant that the same had been sent for the reason that the appellant had failed to make return in July, 1910. On January 25, 1911, the appellant filed with the board of personal tax appraisers an affidavit stating that its gross earnings for the year ending June 30, 1910, were \$1,302,989.60. The affidavit was contained in and attached to one of the printed schedules. It was accepted by the board of personal tax appraisers as a correct return of the amount of the gross earnings of the appellant and neither the board nor any other official of the District made any investigation or inquiry as to the amount of said gross earnings other than to request the appellant to make return as aforesaid. No notice of the rejection of the return was given the appellant. No one suffered or sustained any pecuniary loss, damage, or injury by rea-

son of the failure of the appellant to make the affidavit or return on or before August 1, 1910, as the tax was not payable until the following May. The only attempted assessment of a tax based on such gross earnings was the entry by the board of personal tax appraisers in a final list or roll of persons or corporations, and property subject to taxation under the Act of Congress in question, subsequently to March 1, 1911, of the words and figures "\$1,563,587.52, assessed value; \$62,543.50, tax." These entries do not show what was assessed or how the valuation was arrived at. It is admitted by the demurrer to plaintiff's declaration that 20 per centum was added to the amount of the gross earnings as shown in the appellant's affidavit, and it is conjectured that the figures then entered on the assessment roll or list, namely, \$1,563,587.52, were reached by the addition of said 20 per centum for the purpose of imposing the 20 per centum penalty provided by paragraph aforesaid. It is further conjectured that the entry of "\$62,543.50, tax" on the assessment roll or list represented 4 per centum upon the aggregate of the gross earnings and the 20 per centum penalty. Thereafter in notices and tax bills sent out it was assumed that the assessed valuation of the appellant's personal property was \$1,563,587.52, and that the tax was 4 per centum of that sum or \$62,543.50.

Under the law all taxes are payable in May and if not paid in that month a penalty of 1 per centum is added. On May 29, 1911, the appellant tendered in settlement of the tax on its

gross earnings to the Collector of Taxes \$52,119.58, the same being 4 per centum upon the amount of its gross earnings for the year ending June 30, 1910. The tender was rejected and refused on the ground that there was owing from the appellant a penalty of 20 per centum on the amount of the tax, in addition to the tax, or a total of \$62,543.50.

On June 5, 1911, the appellees demanded of the appellant the payment of \$63,168.94, having added a 1 per centum penalty for failure to pay before June 1, 1911, the 1 per centum being calculated upon the aggregate of the gross earnings and the 20 per centum penalty. The appellant again refused to pay more than \$52,119.58 which amount it again tendered. The tender was rejected and refused and thereafter the property of the appellant was distrained upon by the appellees and the appellees refused to release it until the amount demanded should be paid. The appellant under the coercion of the duress and to escape the sale of its property under the process of distress paid the amount demanded, \$63,168.94.

By the first count of the declaration the appellant sought to recover the aggregate of the two penalties imposed, namely, the 20 per centum penalty and the 1 per centum penalty, such aggregate sum being \$11,049.35, on the ground that the alleged penalties were illegal and were wrongfully imposed and collected.

By the second count of the declaration the appellant sought to recover the entire amount of money so paid by it to the appellees, under the duress of the

distrain, namely, \$63,168.94, upon the theory that the whole amount was wrongfully collected because the tax was never validly assessed, the entries on the final assessment or tax rolls or lists which comprised the only assessment attempted to be made, not being a valid assessment under the law.

As stated there was a demurrer to both counts of the declaration and the Court below sustained the demurrer. The appellant elected not to amend and judgment was entered dismissing the action. From such judgment this appeal is taken.

ASSIGNMENTS OF ERROR.

The court below erred in sustaining the demurrer to the declaration as finally amended and rendering judgment for the defendants, in that

As to the first count:

(1) Under a proper construction of paragraph 1 of section 6 of the Act of Congress of July 1, 1902 (32 Stat. at L. 590-629), it was not the duty of the appellant to make return of its gross earnings for the year ending June 30, 1910, upon one of the schedules mentioned therein, nor under said paragraph did the board of personal tax appraisers have any power to assess or attempt to assess against appellant a tax upon said gross earnings for the failure of the appellant to make such return, or to add a 20 per centum penalty thereto.

(2) The sole duty of the appellant under said act of July 1, 1902, was to make a return of its gross

earnings for the year ending June 30, 1910, on or before August 1, 1910, as provided by paragraph 5 of section 6 of said act, which section provides no penalty whatever for failure to make such return.

(3) That the tax upon the gross earnings of a telephone company imposed by said act of July 1, 1902, is a franchise tax and not a personal property tax as provided for in paragraph 1 of section 6 of said act of Congress of July 1, 1902, and therefore no return was required to be made by the appellant under said paragraph 1 of its said gross earnings, and the penalty prescribed by said paragraph 1 could not lawfully be imposed upon it for failure to make such return under said paragraph.

(4) That even assuming that it was the duty of the appellant to make return of its gross earnings for the year ending June 30, 1910, under the provisions of paragraph 1 of section 6 of said act of Congress of July 1, 1902, the penalty authorized to be imposed by said paragraph could not lawfully be imposed until the board of personal tax appraisers had first "without delay from the best information they could procure" actually made an assessment; and the first count of the declaration shows that the board of personal tax appraisers made no such inquiry or investigation, and attempted to make no assessment whatever until the appellant made its affidavit on January 25, 1911, which affidavit the said board of personal tax appraisers accepted and used as the basis for their action in attempting to make such assessment.

(5) That assuming that the board of personal tax appraisers had the right to impose a penalty of 20

per centum on the gross earnings of the appellant for the year ending June 30, 1910, it had no right, nor had the appellees, or either of them, the right to impose or attempt to impose a penalty of 1 per centum (as was done) upon the aggregate amount of the alleged tax and 20 per centum, because by such action a penalty was imposed upon a penalty, which is contrary to law.

As to the second count:

(6) That the second count of the declaration shows that no valid assessment was made against the appellant or its property, in that the entries in the assessment rolls failed to in any wise describe the property or franchise sought to be assessed, but contained only the name of the appellant and the amount of the attempted assessment.

ARGUMENT IN GENERAL.

The appellant does not question the requirement that it should make return of its gross earnings for the preceding fiscal year on or before the first day of August of each year. It has made such return on or before the first day of August of each year since the enactment of the law, except in 1910. In that year, through the neglect of a subordinate official, the return was not made in time. It is admitted by the demurrer that neither the District of Columbia nor any one else was injured by the failure to make this return in time. Yet for what was merely an oversight, without the

slightest intention to delay the return, appellant has been required to pay under duress as penalties the large sum of \$11,049.35, which is utterly disproportionate. The appellant denies absolutely the right of the District of Columbia to impose the penalties which it has exacted. If any penalty was to be exacted for a mere oversight in making a return, it was amply provided in Paragraph 18 of the law in question, making any person or persons violating any of its provisions liable to a penalty of not exceeding \$500 for each offence with six months' imprisonment for non-payment of such fine.

The appellant contends that the 20 per centum penalty imposed and collected by the appellees in this case is manifestly intended by the law to apply only to returns of personal property, and not to returns of gross earnings or other basis for a franchise tax, as in the case of the appellant. The proviso which alone authorizes the 20 per centum penalty relates plainly to tangible personal property. Under the settled rules of construction, as laid down by the Court of Appeals and the Supreme Court of the United States, this provision can not be extended "beyond its clear terms by any inference, implication or analogy." The doctrine now held, (contrary to statements in some of the earlier cases in the Supreme Court of the United States,) is that a tax payer shall not be charged with taxes, much less with penalties, unless they are plainly applied by the statute "in clear and unambiguous language," and under an interpretation which shall be equally fair to the taxpayer and the State.

It is obvious that the necessity for heavy penalties for failure to make returns of personal property does not exist in the case of public service and other corporations having special franchises, with respect to the return of gross earnings, since the amount of gross earnings can be so easily ascertained, as, for example, in the case of the appellant, from the sworn report required by and made to Congress annually (33 Stats., 374), or from the return made to the District for the previous year. Reading together the Acts of August 14, 1894, July 1, 1902, and April 28, 1904, for taxation in the District of Columbia, there is no doubt of the power of the District of Columbia to assess by its proper officers and impose taxes on all the different forms of property, real, personal and franchise, specifically mentioned in those Acts.

By these Acts Congress has provided machinery for levying taxes, and suitable penalties to secure such levies, differently and appropriately to each of the three sources of taxes, namely, real property, personal property and franchises.

In the case of any special franchise corporation a failure to make a return would subject it to a possible assessment much higher than its actual assessment ought to be, whether there was any penalty affixed or not. It would be subject to the "doom" of the assessor.

Congress has plainly recognized the distinction between the two classes of returns by making provision for a heavy penalty only in the case of personal property and making a different provision for

the returns of the special franchise corporations. For example, leaving out appellant's case, Congress provided in Paragraph 5 of Section 6 in question that street railroad companies should continue to pay a per centum tax on their gross earnings reported not to the assessor but to Congress and with no penalty for failure to report; and, also, that insurance companies should continue to pay a per centum tax on premium receipts as provided by Section 650 of the District Code, which provides for their reporting their premium receipts to the Superintendent of Insurance, but provides no penalty for failure to do so. In no such case is there any possibility of an appraisal of a schedule or inventory of articles as in the case of personal property, nor is there necessity for making search for such property, requiring time and effort, or for any personal inspection of such property, nor is there any provision for subpoena process as to persons or books or papers or for administering oaths in any investigations; in other words, Congress apparently relied upon the known ease with which gross earnings could be ascertained and taxed, as against the known difficulty in the case of personal property.

But if it should be thought that Congress has not made definite provision for the assessment and levying of special franchise taxes in the absence of the returns of gross earnings, that omission can not be supplied by the courts, but must be supplied by Congress itself.

“In the construction of revenue laws special consideration is, of course, to be had of the

purpose for which they are enacted. That purpose is to supply the government with revenue. But in the proceedings to obtain this it is also intended that no unnecessary injury shall be inflicted on the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation and all legislative action is entitled to the presumption that this has been intended.

“ ‘Statutes,’ says a learned and able writer (quoting Dwarris on Statutes, 742, 749, citing *Treat vs. White*, 181 U. S., 264, and other cases), ‘made for the advancement of trade and commerce and to regulate the conduct of merchants, ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of that sort the legislature would be laying a snare for the subject and a construction which conveys such an interpretation ought never to be adopted. Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil if there be any. * * *

“In like manner in the revenue laws where clauses inflicting pains and penalties are ambiguously or obscurely worded the interpretation is ever in favor of the subject, ‘for this plain reason,’ said Heath, J., in *Hubbard vs. Johnstone*, 3 Taunt., 177, ‘that the legislature is ever at hand to explain its own meaning and to express more clearly what has been obscurely expressed.’ The same author (Dwarris) on another page, says, ‘It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language.

When there is any ambiguity found the construction must be in favor of the public because it is a general rule that when the public are to be charged with a burden the intention of the legislature to impose that burden must be explicitly shown.' This statement of the general rule expresses the view which it is believed has always prevailed in England. It is also that which has been adopted in the several States. Like views have been frequently expressed by the federal courts."

Cooley on Taxation, 3d Ed., p. 542.

And as to the particular omission here in question, viz., a failure to make a return, the same author says (Cooley, Taxation, 3d Ed., p. 623):

"When the discrimination (by the State against the person in default) consists merely in submitting the party to the 'doom' of the assessor and depriving him of any appeal, it would seem there could be no valid objection to it. The assessor will be likely under such circumstances to make liberal estimates of the property so that the State, it may be presumed, will not be the loser, and the taxpayer, if he is over assessed, suffers a misfortune for which no one, unless it be himself, is blameable. But when a statute goes further and subjects the person to penalties of any kind to be inflicted by a ministerial officer without a hearing, for a neglect that may have been unintentional and perhaps entirely excusable, it is not clear that it is consistent with the genius of the common law or with general principles of American jurisprudence. But the authorities sustain such statutes 'on the ground of State necessity and

commercial usage.' *Ex parte Lynch*, 16 S. C., 32. It has been decided in Kentucky that penal provisions of this character must be construed strictly. *Alexander vs. Crum*, 1 Bibb., 515; *McCall vs. Justice*, 1 Bibb., 516; *Olds vs. Comm.*, 3 A. K. Marsh, 405; *Childs vs. Comm.*, 4 J. J. Marsh, 577). A decision quite in harmony with the general rules of construction."

To the same effect may be quoted Sutherland on Statutory Construction, Secs. 361, 362, 363, and notes.

FIRST ASSIGNMENT OF ERROR.

Under a proper construction of paragraph 1 of section 6 of the Act of Congress of July 1, 1902 (32 Stat. at L., 590-629) it was not the duty of the appellant to make return of its gross earnings for the year ending June 30, 1910, upon one of the schedules mentioned therein, nor under said paragraph did the board of personal tax appraisers have any power to assess or attempt to assess against appellant a tax upon said gross earnings for the failure of the appellant to make such return, or to add a 20 per centum penalty thereto.

HISTORY OF ACT OF 1902.

In *Washington Terminal Company vs. The District of Columbia*, 36 App., D. C., 190, 191, this Court said:

"In applying the statute, we may look to the conditions existing when the act was passed,

and from that determine what must have been in the minds of the lawmakers. 'But courts, in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it.' *United States vs. Union P. R. Co.*, 91 U. S., 72. Applying this familiar rule to the present case, we find the physical conditions existing at the time of the passage of the act of 1883 entirely changed in so far as they apply to the terminal company. It was this physical condition alone that called for the enactment of the law. Statutes of this character are to be strictly construed in their application, and it would be equivalent to the assumption of legislative power for the Court to hold that this act applies to railroads operated above and below the street grades a sufficient distance to clear the public using the streets. 'It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.' *Church of the Holy Trinity vs. United States*, 143 U. S., 457."

Following this doctrine a brief examination of the history of this legislation is necessary.

**TO REPLACE INVALID PERSONAL PROPERTY TAX
LAW OF 1877.**

On December 26, 1901, the Supreme Court of the District of Columbia, through Chief Justice Claibough, in the test case of Heald vs. District of Columbia (unreported), declared the personal tax law in the act of March 3, 1877, to be invalid. The Commissioners of the District of Columbia did not appeal but brought the fact of the decision to the attention of Congress through its committees. Congress was also faced with the fact that it was as difficult to ascertain the personal property subject to taxation here as in other jurisdictions, it being universally regarded as the most elusive form of taxable property, requiring inquisitorial powers and heavy penalties in order to prevent its escape from assessment. There was no franchise tax in the act of March 3, 1877, on the public utility and other corporations having special franchises, and no recommendations made by the Commissioners for such franchise taxes in the proposed personal property tax law.

**FRANCHISE TAXES NOT IN ACT OF 1877.
AN AFTERTHOUGHT IN ACT OF 1902.**

The provision for the special franchise tax in question was prepared in *conference committee* of the two houses on the District of Columbia appropriations act approved July 1, 1902, and adopted by the two houses as part of the *conference report* without that deliberation in either house which is usually given to a

measure presented to Congress by bill in the usual manner. Important omissions might easily be made in such process of legislation and as a matter of fact they have often been made under just such circumstances. We have then in section 6 of the act approved July 1, 1902, both a personal property tax law and a franchise tax law, besides miscellaneous provisions including those for the machinery for assessing not only personal property but real estate, and the granting of liquor licenses, taxes on real estate and the creation of new offices and salaries under the assessors of the District of Columbia. Section 6 like the act itself is not homogeneous and on its face it indicates the necessity for careful consideration of each paragraph separately. A first reading of the paragraphs of section 6 will show that it deals with different classes of taxes, with different classes of taxpayers and with different methods of tax assessment and payment.

Under the doctrine of *Bride vs. Macfarland*, 18 App., D. C., 125, the personal tax law in the Act of March 3, 1877, notwithstanding it was held to be invalid, can and should be considered in connection with the personal tax provisions in the Act of 1902 which will be found to be in nearly the same language. It is evident that until as an afterthought franchise taxes were added by the conference committee, Congress was dealing with the question of taxation of personal estate.

CONFLICT OF DATES OF DIFFERENT RETURNS SIGNIFICANT.

An important difference in the dates by which the returns of personal property and the returns of the gross earnings of the appellant and other special franchise corporations should be made is apparent.

It will be seen that the returns provided for in paragraph 1 on the part of personal taxpayers are not to be made on or before the 1st of August in each year, as in the case of the special franchise corporations, and others mentioned in subsequent paragraphs of the section. No date is prescribed for the preparation of the printed blank schedule, and no date is prescribed for the advertisement that it is ready for delivery. The act itself was approved July 1, 1902, and provided for the assessment of the property mentioned in this section "upon the books for taxation for the fiscal year beginning July 1, 1902, and each fiscal year thereafter." It is obvious that the printed blank schedule for that year could not be prepared and advertised so as to leave a thirty-day period for returns prior to the first of August, 1902. Even if the assessor had prepared the printed blank schedule for that year in advance of the approval of the act on the first day of July, 1902, and even if he had begun on that day the three days' advertisement that the printed schedule was ready, the thirty-day period could not expire until after the first day of August. But appellant was required to make its return before the first day of August, 1902, under penalty of criminal prosecution under Paragraph 18 of the act. In that year, it

will be conceded that the requirement contended for by the appellees would be not only inconsistent but impracticable, and since that year, it has been equally so in fact.

Any action by the assessor of the District of Columbia with respect to the preparation and advertisement of such printed blank schedules which would make the thirty-day period coincident with the month of July, so that it should expire before the first day of August, would be purely voluntary and not required by the act and could be changed at any time. The thirty-day period might well expire, or even begin on any day after the first of August, but the corporations required to make a return on or before the first of August are held down to that particular time and could not overstep it.

SPECIAL, DISTINGUISHED FROM GENERAL FRANCHISE TAXES.

The power to tax property within a State or municipality includes not only the power to tax the conduits and wires of a telephone company, but also the power to tax the intangible right or franchise granted to the company, expressly or tacitly, by the State or municipality to construct, maintain and operate the telephone lines in the public streets and highways.

(Dillon, *Municipal Corporations*, 5th Ed., Sec. 1392, *People vs. Tax Commissioner*, 174 N. Y., 417, affirmed by the Supreme Court of the United States, *sub. nom.*; *Metropolitan Street Railway vs. Board of Tax Comm.*, 199 U. S., 1.)

This intangible right is a "special franchise" as distinguished from a "general franchise" granted to a number of persons to do business as a corporation. These two franchises, the general, to do business as a corporation, and the special, to use public streets or facilities to do that business, are frequently taxed by different methods by the same taxing power. (Dillon, Note 2, Section 1392.) So in this case, under paragraph 1, corporations are assessed and taxed on their *general* franchise; the schedule to contain—

"the classes of corporations and companies to be assessed * * * a full and true statement of all such personal property, taxable capital and other basis of assessment or either, as the case may be."

The corporations taxed upon the *assessed value of their capital stock* are plainly those described in paragraph 8, and as plainly the tax is upon the general franchise, upon the right to do business of any kind as a corporation.

A similar provision was made in the act of 1877, and construed not to be a tax on a special franchise, in *Alexandria Canal Railway and Bridge Co. v. D. C.*, 5 Mackey, 376.

The corporations taxed upon "other basis of assessment" are those described in paragraphs 6 and 9, taxed upon their *general franchise*, but *not* on the basis of *assessed value of capital stock*. It is to be noted that as to the corporations described in para-

graphs 6, 8 and 9, no special return at a specially named time is prescribed.

The classes of corporations named in paragraph 5, namely, national and other incorporated banks and trust companies, gas, electric lighting and telephone and street railway companies, all exercise and depend upon special franchises without which they could do no business. So, too, the savings banks named in paragraph 7. This, Congress has recognized by taxing in a special manner their special franchises, providing for a special and appropriate rate of taxation, and a special return at a specifically named time, for each individually in the paragraph in which its name specifically appears.

This is peculiarly true of the appellant, a corporation created under the laws of the State of New York, enjoying no *general* franchise from the District of Columbia, but only the *special* franchise above described.

PENALTY PROVISIO PENAL.

A fortiori this reasoning applies to the proviso authorizing a 20 per centum penalty upon which the appellees relied in this case. That proviso is as follows (Sec. 6, Par. 1):

“Provided, that if any person, firm, association, corporation, company, administrator, executor, guardian, or trustee shall fail to make and deliver to the assessor or one of the said appraisers, within thirty days after the date of the last advertisement of the notice hereinbefore required, the

schedule of his or its said personal property, owned, held in trust, or otherwise, as provided for in this section, then the said board of personal-tax appraisers hereinbefore provided for shall without delay, from the best information they can procure, make an assessment against such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, to which they shall add twenty per centum thereof."

Under the doctrine of *Arkansas vs. Bowen*, 3 App., D. C., 544, and *Jackson vs. Clifford*, 5 App., D. C., 321, 322, this is penal in its character and "must be construed with strictness as against those sought to be subjected to its liabilities." *Chase vs. Curtis*, 113 U. S., 432-457, cited with approval in *Jackson vs. Clifford*, *supra*.

PENALTY PROVISIO COVERS PERSONAL PROPERTY ONLY.

Even if it should be conceded, for the sake of argument, that the return of the gross earnings of the appellant might properly have been required on the schedule mentioned in the paragraph under consideration, it must be seen by a first reading of the penalty proviso that it applies only to a failure to return "the schedule of his or its said *personal property*, owned, held in trust, or otherwise, as provided for in this section." The 20 per centum penalty itself is only obtained by adding "*twenty per centum thereof*" in an assessment of the "said personal property" referred to from the best information the board of personal tax appraisers can procure, which assessment they are to make without delay.

It is clear that the class of taxable property referred to here is the same as that in the beginning of this particular portion of the first paragraph of section 6 where the language is "all tangible, personal property and all general merchandise or stock in trade owned or held in trust or otherwise." Here it is described as "said personal property owned, held in trust, or otherwise." It is also clear that it is the same kind of property as that referred to in the clause relating to the returns, with affidavit, to be made within the thirty-day period, namely, such as can be assessed at a "fair cash value," since the penalty is determined by adding 20 per centum of the amount of such an assessment. This can no more refer to the gross earnings of a public utility corporation than can the previous provision that upon a return being made the personal-tax appraisers "shall assess said property at its fair cash value."

* * * *

In *Moss vs. United States*, 29 App. D. C., 195, this Court said:

"On the contrary, it is, undoubtedly, the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import, if the Court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to

embrace in it. *Brewer vs. Blougher*, 14 Pet., 197, 198.”

* * * *

Again, in *Rohde vs. United States*, 34 App. D. C., 256, this Court said, “Where a penal statute is to be construed it must like others be given a reasonable construction so as to avoid an absurd or unjust conclusion. *Fields vs. United States*, 27 App. D. C., 433-440.”

And in *United States vs. Cella*, 37 App. D. C., 429-436, this Court said:

“Penal statutes, like all others, are the embodiment of legislative will in concrete form, and constitute a rule of conduct for the guidance and control of the individual. If the form employed be intelligible to the ordinary individual, the prime requisite of the statute is met; in other words, if the ordinary individual, after reading the statute, knows exactly what he may and may not do, the meaning cannot be said to be ambiguous. If such a statute be within the scope of legislative authority, it is the plain duty of the court to sustain and enforce it.”

“And where general words are employed, there meaning should be restricted to the obvious scope of the statute. *United States vs. Palmer*, 3 Wheat., 610; *Church of Holy Trinity vs. United States*, 143 U. S., 457; *United States vs. Kirby*, 7 Wall., 482; *Petri vs. Commercial National Bank*, 142 U. S., 644.”

The application of the doctrine of these cases leads to the conclusion that a penalty for failure to return a schedule of personal property can not be applied

to a failure to return gross earnings of a public service corporation required for the assessment of a special franchise tax.

WHAT "CORPORATION" IN THE PENALTY CLAUSE MEANS.

As to the "corporation" mentioned in the penalty proviso. That word will be found in the penalty clause of the personal property tax provision in the Act of March 3, 1877, which Act, of course, contains no special franchise taxes or provision for the return of gross earnings. It clearly means a corporation not possessing a *special franchise*, which is necessarily and specially exempted from the franchise taxes by the Act.

They are the corporations mentioned in paragraph 8, amended 1904, as follows:

"Provided, that nothing in this paragraph contained shall be construed to include business companies, which, by reason of or in addition to incorporation receive no *special franchise* or *privilege*; but all such corporations shall be rated, assessed, and taxed as individuals, conducting business in similar lines are rated, assessed, and taxed."

That is to say, instead of a special franchise tax, they are to pay on personal property like individuals, and must, of course, make their returns like individuals under the provision of paragraph 1 of section 6 in a schedule and not under the provisions of paragraph 5 covering corporations having special franchises.

NEITHER EXECUTIVE NOR JUDICIARY CAN EXTEND PERSONAL PROPERTY PENALTY TO SPECIAL FRANCHISE RETURNS.

The penalty having been made applicable by the legislature only to personal property, can not be extended either by the executive or judiciary to a special franchise tax:

“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere failure to provide for contingencies, which it may seem wise to have been specifically provided for, justify any judicial addition to the language of the statute.” *United States vs. Goldenberg*, 168 U. S., 95, 102.

Even if the court should think that a heavier penalty for failure to make return of gross earnings by a special franchise corporation than that provided in paragraph 18 of the Act under consideration was intended by Congress, though omitted by Congress, it could not impose it.

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As was said by this Court in *District of Columbia*

vs. *Gant*, 28 App. D. C., 188, "This Court has no power to amend this statute, and can only interpret it. It would seem that Congress intended to protect producers by prohibiting dishonest vendors from selling provisions, produce or commodities for a weight or measure greater than the actual or true weight or measure thereof, but the statute does not say so."

If there is any question of doubt it must be resolved in favor of the tax payer.

As this Court said in *U. S. Ex Rel. Hufty vs. Trimble*, 14 App., D. C., 419.

"This conclusion cannot be reached without reading a proviso into the law, or, at least, without a strained construction that is clearly not admissible, under any circumstances, in the case of laws imposing duties and affixing penalties.

" 'Laws imposing duties are never construed beyond the natural import of the language; and duties are never imposed upon doubtful interpretations; for every duty imposes a burden upon the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute.' *Adams vs. Bancroft*, 3 Summer, 384, 387. See also *Hartmanft vs. Weigmann*, 121 U. S., 609, 616; *American Net and Twine Co. vs. Worthington*, 141 U. S., 468, 474."

SECOND ASSIGNMENT OF ERROR.

The sole duty of the appellant under said act of July 1, 1902, was to make a return of its gross earnings for the year ending June 30, 1910, on or before August 1, 1910, as provided by paragraph 5 of section

6 of said act, which section provides no penalty whatever for failure to make such return.

The appellant and other special franchise corporations are taxed under paragraph 5 as follows:

“Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the collector of taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank, and all other incorporated banks, and trust companies, respectively, six per centum; each gas company, five per centum; each electric lighting, and telephone company, four per centum. And in addition thereto the real estate owned by each national or other incorporated bank, and each trust, gas, electric lighting, and telephone company in the District of Columbia, shall be taxed as other real estate in said District: *Provided*, That street railroad companies shall continue to pay the four per centum per annum on their gross receipts and other taxes as provided by existing law, and insurance companies shall continue to pay the one and one-half per centum on premium receipts, as provided by section six hundred and fifty of the Code of the District of Columbia. That so much

of the act approved October first, eighteen hundred and ninety, entitled 'An Act to provide for the incorporation of trust, loan, mortgage, and certain other corporations within the District of Columbia,' as is inconsistent with the provisions of this section is hereby repealed."

Under the rules of construction laid down in the cases cited under the first assignment of error the duty of the appellant is clear. It was to "make affidavit to the board of personal tax appraisers on or before the first day of August each year as to the amount of its gross earnings for the preceding year ending the thirtieth day of June," and to pay to the Collector of Taxes 4 per centum on such gross earnings. In addition it must pay the regular real estate taxes.

**PROVIDES NOT FOR A PERSONAL PROPERTY BUT
A SPECIAL FRANCHISE TAX.**

Clearly this is a provision not for a tax on personal property, but for a tax on the gross earnings of the corporations mentioned, a customary form of what is called a franchise tax on corporations receiving special franchise or privilege. The language is clear, comprehensive and complete. (See note, 57 L. R. A., 33.) The taxpayer affected knows exactly what it may and may not do, and the meaning can not be said to be ambiguous. No such requirement as to returns is made of the owners of personal property and owners of real estate. A different requirement is expressly provided elsewhere for corporations not having special franchises.

Now the return of the gross earnings, which is the matter in controversy here, is to be made by affidavit which may be in any form, since no particular form is prescribed. It must be submitted on or before the 1st of August of each year. The appellant could not wait for the preparation of the schedules which might not be ready in time for it to make its return on or before the 1st of August and which were not so ready in 1902. The appellant would not be justified in considering any later date than the 1st of August as the limit of its requirement.

Special franchise taxes are clearly to be distinguished from all the forms of taxation which involve appraisal, as in the references to personal property in the law under consideration of which it is said that the personal tax appraisers "shall assess said property at its fair cash value," or as in the 20 per centum penalty clause, if the "schedule of his or its personal property, owned, held in trust, or otherwise, as provided for in this section" shall not be made within the time required for such returns "shall without delay from the best information they can procure, make an assessment against such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, *to which they shall add twenty per centum thereof.*"

SIMILAR LANGUAGE IN ACT 1877 HELD BY SUPREME COURT, D. C., 1887, NOT TO APPLY TO SPECIAL FRANCHISE TAXES.

This paragraph 1 of the law under consideration in its reference to personal property and its im-

position of a penalty for failure to make returns is substantially identical in substance and similar in language to section 10 of the act of March 3, 1877. The very question involved in the present case, whether or no provision is made in paragraph 1 of the act of 1902 respecting special franchise taxes, was decided as to the analogous act of 1877 by the Supreme Court of the District of Columbia in general term, through Cox, J., in *Alexandria Canal Ry. and Bridge Co. vs. D. C.*, 5 Mackey 376, on January 24, 1887, where that learned Judge said in reference to the act of 1877:

“Under no head or enumeration of subjects do we find that a franchise may be taxed as an independent and distinct subject matter. It seems to us, therefore, that the assessor has no right to assess a tax upon a franchise of a corporation at all and we cannot from the evidence or anything in the record separate the tax on the franchise from that on the rest of the property. It is a gross sum.”

And the court then applied the rule in *Santa Clara County vs. Southern Pac. Ry. Co.*, 118 U. S., 394:

“An assessment of a tax is invalid and will not support an action for the recovery of a tax if being laid upon different kinds of property as a unit, it includes property not legally assessable and if the part of the tax assessed upon the latter property cannot be separated from the other part of it.”

And Judge Cox further said, "*But it is clear that the tax laws of the District do not in terms or by implication confer on the authorities of the District the power to tax the franchise of a non-resident corporation.*"

In that case as this, the plaintiff was a non-resident corporation and the tax sought to be imposed was a special franchise tax.

THIRD ASSIGNMENT OF ERROR.

That the tax upon the gross earnings of a telephone company imposed by said act of July 1, 1902, is a franchise tax and not a personal property tax as provided for in paragraph 1 of section 6 of said act of Congress of July 1, 1902, and therefore no return was required to be made by the appellant under said paragraph 1 of its said gross earnings, and the penalty prescribed by said paragraph 1 could not lawfully be imposed upon it for failure to make such return under said paragraph.

It will be observed that paragraph 1 of section 6 of the act in question requires the board of personal tax appraisers after a property owner shall have made a return of his taxable property, on one of the schedules provided for, to "assess said property at its fair cash value, and enter the same in the columns upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation."

VALUATION OF PROPERTY INTENDED; GROSS EARNINGS INCAPABLE OF VALUATION.

The property therefore intended to be embraced in this paragraph, is such property as is capable of being assessed. The natural inquiry that immediately suggests itself is "What is meant by an assessment?" An assessment is defined in *Baltimore vs. Greenmount Cemetery*, 7 Md., 535, as a "valuation made by authorized persons according to their discretion, as opposed to a sum certain, or determined by law."

Paragraph 1, therefore, is meant to embrace only such property as is capable of being valued by the board of personal tax appraisers, in the exercise of their discretion.

Manifestly, it is not intended to embrace the annual gross earnings of a corporation; such earnings being in money or cash, cannot, properly speaking, be valued. They speak for themselves, so far as value is concerned. And that is why Congress by paragraph 5 provides that telephone and other companies named, shall pay 4 per centum of their gross earnings. It is significant that this section does not speak of such 4 per centum as a tax, but merely requires the named companies to pay annually to the collector of taxes that proportion of their gross earnings. Of course it is a tax, but in reality it is a special franchise tax, measured, without appraisal, by the amount of such gross earnings. (See the note in 57 L. R. A., 33.) In no sense is it a property tax. There is no room for an assessment or valuation. The only question is as to the amount of the

gross earnings, and to ascertain the amount, each company is required by paragraph 5 to make an affidavit before the first day of August of each year as to the amount of its gross earnings for the preceding year, and a failure to make such return is punishable by fine in the Police Court by paragraph 18.

This Court said in *Transportation Co. vs. D. C.*, 19 App. D. C., 470.

“Applying the well-settled general principle applicable in the construction of revenue or tax laws, there would seem to be, at least, reasonable ground for holding that the electric carriages or vehicles used by the defendant are not fairly within the meaning and purview of the license act of the legislative assembly. All the authorities agree in maintaining, that all charges upon the citizen must be imposed by clear and unambiguous language; because, as it is said, they operate as penalties. In a case of doubt, that construction most beneficial to the citizen must be adopted. This is illustrated by many decided cases.

In the case of *Adams vs. Bancroft*, 3 Sumner, 384, 387, Mr. Justice Story stated the rule upon this subject in these terms: ‘I may add, in this connection, that laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizen upon doubtful interpretation, for every duty imposes a burden on the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute.’

In the subsequent case of *United States vs. Wigglesworth*, 2 Story Rep., 369, the same learn-

ed judge, in laying down the rule, said, 'It is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties, upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the citizen, because burgens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import.'

And see *Wilson vs. District of Columbia*, 26 App. D. C., 112; *Lockwood vs. District of Columbia*, 24 App. D. C., 569; *District of Columbia vs. Chapman*, 25 App. D. C., 95.

ILLUSTRATIONS FROM THE ACT AS TO INTENT OF CONGRESS.

We lay emphasis upon the following proviso in paragraph five:

“Provided: That street railroad companies shall continue to pay the four per centum per annum on their gross receipts and other taxes as provided by existing law, and insurance companies shall continue to pay the one and one-half per centum on premium receipts, as provided by section six hundred and fifty of the Code of the District of Columbia. That so much of the Act approved October first, eighteen hundred and ninety, entitled ‘An act to provide for the incorporation of trust, loan, mortgage and

certain other corporations within the District of Columbia' as is inconsistent with the provisions of this section is hereby repealed."

This proviso is worthy of the closest examination because it indicates so plainly the intention of Congress to treat the returns by the corporations mentioned in this paragraph differently from the returns required of personal property taxpayers, and also to deal with such corporations quite distinctively. Prior to the act approved July 1, 1902, the only special franchise tax upon public utility corporations in the District of Columbia was that on street railroad companies and the treatment of it by Congress shows its attitude and purposes respecting such taxation.

AS TO STREET RAILWAYS.

This franchise tax was originally imposed not in general or personal property tax laws, but in separate acts of Congress chartering street railroad companies. A typical provision is that in the act approved October 18, 1888 (25 Stat., 560), which incorporated the Brightwood Railroad Company of the District of Columbia, requiring it to report to Congress on or before the 15th of January of each year, among other things, a detailed statement of the receipts and expenditures for the preceding year ending Decemebtr 31st, verified by affidavit, adding "and if such report is not made at the time specified or within ten days thereafter it shall be the duty of the Commissioners to cause to be in-

stituted judicial proceedings to forfeit its charter;" and then requiring the company to pay in lieu of taxes upon personal property 4 per centum of its gross earnings upon its traffic, to be payable, and with penalties on arrears, as other taxes. But in 1896 Congress substituted for the requirement as to annual reports from such railroad companies a very different provision. It is section 10 of the act approved June 10, 1896 (29 Stat., 320), and provides that "every street railroad corporation of the District of Columbia and every such corporation which shall hereafter be organized shall on or before the first day of February in each year make report to each, the Senate and House of Representatives," verified by affidavit for the year ending December 31st previous; with a long list of the items including all amounts of receipts and expenditures which shall be included in such report. No penalty is imposed for not making the report at the time specified. It will hardly be contended that the provision of the former law for judicial proceedings to forfeit the charter if the report is made too late is now in effect, but if that were true it would provide not a summary assessor's penalty, but a long, difficult, extraordinary process. It may very well be that Congress, believing that the extraordinary remedy of *quo warranto* could be invoked by the sovereign at any time against any corporation defying it, to say nothing of its ample powers by legislation to deal with a recalcitrant corporation enjoying franchises, thought it unnecessary to continue such a remedy in the statute.

Incidentally it will be observed that the return of

street railroad corporations is not to be made to the board of personal tax appraisers but to Congress. It cannot be contended that if the street railroad companies did not also make returns to assessors of the District of Columbia or to the board of personal tax appraisers on the printed blank schedules provided for in paragraph 1 of section 6 within the prescribed thirty-three days, the board of personal tax appraisers would be authorized to impose a penalty of 20 per centum on the gross receipts of such street railroad companies for their failure to do so.

AS TO INSURANCE COMPANIES.

Again, special provision is made in this proviso of paragraph 5 for a return of the premium receipts of the insurance companies, by reference to section 650 of the Code of the District of Columbia, which provides for their furnishing, not to the assessor or the board of personal tax appraisers, but to the superintendent of insurance during January annually a statement of their business setting forth specifically the net amount of the premium receipts, etc., during the calendar year next preceding, and then paying the collector of taxes, before March first of each year, a sum equal to $1\frac{1}{2}$ per centum of said premium receipts of the last preceding calendar year, and which provides no penalty whatever for the omission to make statement of the premium receipts, but does provide for a revocation of the license and penalty of 8 per centum per month for failure to pay the tax due

before March first. It will not be claimed that the insurance companies would be subject to the process of assessment and the 20 per centum penalty prescribed for the omission to make the personal tax returns.

Yet, such action would require no greater extension of the language of the 20 per centum penalty proviso beyond its clear terms than is made by the District of Columbia in attempting to impose on the telephone company under a special franchise tax requiring a return of gross earnings by affidavit on or before a certain date, viz.: August first, the 20 per centum penalty provided for the failure to return personal property according to a certain method but not at a certain date.

FOURTH ASSIGNMENT OF ERROR.

That even assuming that it was the duty of the appellant to make return of its gross earnings for the year ending June 30, 1910, under the provisions of paragraph 1 of section 6 of said act of Congress of July 1, 1902, the penalty authorized to be imposed by said paragraph could not lawfully be imposed until the board of personal tax appraisers had first "without delay from the best information they could procure" actually made an assessment; and the first count of the declaration shows that the board of personal tax appraisers made no such inquiry or investigation, and attempted to make no assessment whatever until the appellant made its affidavit on January 25, 1911, which affidavit the said board of personal tax appraisers accepted and used as the basis

for their action in attempting to make such assessment.

Even granting that the appellees are right in their interpretation of the statute, the facts as disclosed by the declaration show that there was no authority to impose the penalty of 20 per centum sought to be recovered. The appellant's position in this respect is this:

WHERE A POWER IS EXERCISED UNDER A STATUTE PRESCRIBING ITS COURSE THAT COURSE MUST BE FOLLOWED.

Let it be conceded for the purposes of argument that it was the duty of the appellant to make return of its gross earnings under the provisions of paragraph 1 of section 6, and, that, if it failed so to do, the penalty of 20 per centum might be imposed upon it. Reference to the proviso authorizing the imposition of the 20 per centum penalty will show plainly that that proviso provides as a prerequisite to the imposition of the penalty that the personal tax appraisers shall first "without delay from the best information they can procure make an assessment against such person * * * to which they shall add 20 per centum thereof." Unless, therefore, the personal tax appraisers have "without delay from the best information they can procure" *actually made* such an assessment, they are without authority to add the penalty; the penalty must be *added to* the assessment so made by them. Two things must be done by the assessors before they are authorized to add the penalty for failure of a

taxpayer to make a return, namely, (1) they must themselves without delay make an investigation of some sort to ascertain the value of the delinquent taxpayer's property; and (2) they must actually make an assessment based upon such value so ascertained. Then and not until then can they add the penalty. *The penalty is to be 20 per centum of the value of the property so ascertained and is to be added to the assessment made, based upon such value.*

EVERY MATERIAL REQUIREMENT OF THE STATUTE MUST BE COMPLIED WITH.

In the case at bar, it is an admitted fact that the personal tax appraisers on failure of the appellant to make its return or affidavit, did not without delay, from the best information they could procure make an assessment against it. On the contrary, they made no assessment whatever until the appellant made its affidavit on January 25, 1911, when, as the declaration avers, the personal tax appraisers "accepted and used said affidavit as a basis for levying and assessing and did levy and assess against the plaintiff" the tax in question, to which they then added the 20 per centum penalty. What right or authority had they under the statute then to add the penalty? The statute does not authorize them to wait until the taxpayer makes his return and then make an assessment and add the penalty. The penalty is presumably provided not only as punishment to taxpayers if they do not make returns, but also as compensation for the additional labor imposed

upon the tax officers for having to ascertain from the best information they can procure the value of the taxpayers' property, and making an assessment based upon such value so ascertained. In the case at bar, they did not attempt to ascertain by their own investigations the value of the appellant's property and, of course, not having done so, they made no assessment based upon such value so ascertained. They did nothing but wait for the appellant to act, and when it did so they attempted to punish it. What justification is there for ignoring the plain terms of the statute and saying that although the taxing officers failed in this case to do what the law required as a prerequisite to the imposition of the penalty, nevertheless they had a right to impose it? It will surely be admitted that if acts are to be done by the taxing power before it can impose a penalty upon the taxpayer, a penalty imposed upon him before the taxing power has first done these acts is absolutely invalid. Here the taxing power had admittedly failed to do these very acts which the law says plainly must be done before it has the right to impose the penalty, and necessarily its failure to do them precludes it from exacting the penalty.

“It is a well-established general principle that where a power is exercised under a statute prescribing its course, that course must be followed and the necessary conditions made to appear. Every material requirement of the statute must be complied with.”

Cohen vs. U. S., 38 App., D. C., 126, citing
Thatcher vs. Powell, 9 Wheat., 119, 127.
Shelby vs. Bacon, 10 How., 56, 69.

Galpin vs. Page, 18 Wall., 350, 371.
 Accord. Sutherland on Statutory Construc-
 tion, Sec. 390.

FIFTH ASSIGNMENT OF ERROR.

That assuming that the board of personal tax appraisers had the right to impose a penalty of 20 per centum on the gross earnings of the appellant for the year ending June 30, 1910, it had no right, nor had the appellees, or either of them, the right to impose or attempt to impose a penalty of 1 per centum (as was done) upon the aggregate amount of the alleged tax and 20 per centum penalty, because by such action a penalty was imposed upon a penalty, which is contrary to law.

Manifestly, whatever may have been the right of the board of personal tax appraisers as to the imposition of the penalty of 20 per centum of the gross earnings of the appellant for the year ending June 30, 1910, the collector of taxes had no right to impose the 1 per centum penalty. To do so was to impose a penalty upon a penalty. This is clearly illustrated in *Hunter vs. Borck*, 51 Ohio St., 326. The statute authorizing the 1 per centum penalty is the act of Congress approved February 14, 1902 (32 Stat. at L., 33). That statute provides that if a tax shall not be paid on the first day of June there shall be added to be collected with said *tax*, a penalty of 1 per centum per month *upon the amount thereof*. By no construction can the statute be construed to authorize a penalty of 1 per centum upon the *penalty already imposed*.

SIXTH ASSIGNMENT OF ERROR.

As to the second count:

That the second count of the declaration shows that no valid assessment was made against the appellant or its property in that the entries in the assessment rolls failed to in any wise describe the property or franchise sought to be assessed, but contained only the name of the appellant and the amount of the attempted assessment.

By the second count, the appellant seeks to recover the entire amount of the tax paid on the ground that there was no valid assessment made against the appellant or its property.

A case in point is that of Dunnell Mfg. Co. vs. Newall, 15 R. I., 233, which was a suit to recover personal taxes paid under protest. In that case, the entry on the assessment roll was "Personal valuation, \$170,000. Personal tax, \$2,266.66." In the opinion holding the assessment void, the Court said:

"For anything that appears the assessors may have assessed the plaintiff corporation for its entire personal estate of every kind. We must assume they did so assess it, and the conclusion that they exceeded their authority. Even if the corporation had no personal estate besides the kind specified in Par. 42, Section 11, we could not know that the assessors did not suppose it had other kinds and assess it accordingly. We think that where the authority to assess is limited to particular kinds of personal estate, the assessment roll should show that the assessment was made only on those kinds, the taxpayer being entitled to know that the assessors kept

within their jurisdiction.” This case was followed in *Rumford Chemical Works vs. Ray*, 19 R. I., 302; *In re Newport Reading Room*, 21 R. I., 440.

In the case at bar the only entries in the assessment roll were “\$1,563,587.52 assessed value; \$62,543.50 tax.” *The entries did not show what was assessed or how the valuation was arrived at.* The case therefore clearly comes within the Rhode Island case just cited.

“The assessment is an indispensable prerequisite to the validity of a tax against any individual, for without a valid assessment there can be no lawful attempt to collect the tax or to enforce it against any specific property.”

37 Cyc., p. 987.

“It is essential to the validity of an assessment list and of all proceedings founded on it that it should contain a description of all the property intended to be assessed; but minute particularity is not required, any description being sufficient which identifies the particular property so clearly that the owner cannot be misled.”

Id., p. 1051.

Where the proper person refused to make out the requisite statement of his personal property for taxation, and the statute required the assessor not only to assess the value of the property in dollars and cents but to list it, that is to say to describe it so as to show more or less definitely, according to its char-

acter, to what property the valuation related, it was held that a tax assessed upon a quantity of wheat attempted to be listed under the head of "household goods, etc.," was invalid.

Thompson vs. Davidson, 15 Minn., 412.

"It is no answer to say the plaintiff has sustained no injury. Courts cannot speculate as to probable injury resulting from departure from a statutory regulation touching the performance of an official duty in matters affecting rights of persons or property of others."

Clark vs. Morton, 49 N. Y., 143. See, also: People vs. Moore, 49 N. Y., 666; Welty's Law of Assessment, pp. 5-221; Falkner vs. Hunt, 16 Calif., 167.

In People vs. Weaver, 100 U. S., 539, the Supreme Court of the United States quotes with approval as follows:

"When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge, against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business." "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed and of estimating the sums

which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation cannot be apportioned without it.” Cooley, Tax., 258, 259; Burroughs, Tax., p. 198, Sec. 94.

It inevitably and logically follows that if the tax on the appellant was a special franchise tax as contended for under the second and third assignments of error, no assessment by the board of personal tax appraisers was necessary, and as paragraph 1 applies only to those taxes where the assessment is required to be made by that board, that paragraph does not apply to the appellant and the imposition of the 20 per centum penalty was improper and illogical. If this be so, then the demurrer to the first count should have been overruled.

If on the other hand, the tax on the appellant's gross earnings was not a special franchise tax, but was such a tax as was required to be assessed by the board of personal tax appraisers under paragraph 1, then as it clearly appears that the assessment was invalid because it failed to describe what property of the appellant was intended to be assessed or valued, the appellant has the right to recover the entire tax so attempted to be assessed under the second count of this declaration and the demurrer to that count should have been overruled.

TWO SUPREME COURT CASES BELIEVED TO BE CONCLUSIVE FOR APPELLANT.

Diligent search of the decisions of this court and of the Supreme Court of the United States has dis-

closed only two cases as to penalties for failure to make returns which seemed even analogous to the present case, and those cases are, it is believed, on all fours with it. It is respectfully asked that the most careful examination may be given to them in their relation to the present case as it is believed they are conclusive for the appellant. They are the cases of *Erskine vs. Railway*, 94 U. S., 619, and *Elliott vs. Railway*, 99 U. S., 573, which held that penalties imposed by the Civil War Internal Revenue Act on individuals failing to pay their income taxes, could not be extended, under the general terms of the statute, so as to cover railroads subjected by the same Act to a tax of 5 per centum on their gains, profits, or incomes however evidenced. Suits were brought by Collectors of Internal Revenue *Erskine* and *Elliott* in successive attempts to apply the penalties mentioned in the manner described.

THE CIVIL WAR INCOME TAX PENALTIES.

The act in question was entitled "An act to supply internal revenue to support the Government, to pay interest on the public debt, and other purposes." Approved June 30, 1864, amended July 13, 1866 (the amendment being immaterial to this case). This act, the income tax act of the Civil War, was confessedly a war measure forced upon the government by extreme necessity. It was for a limited time, until 1870. It was the subject of great litigation and repeated construction by the Supreme Court. Every consideration of public policy made for a construction that would give it the largest effect possible as

a producer of revenue. Among other things, it provided in Section 122 “that any railroad, canal, turnpike, or canal navigation or slackwater company indebted for any money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in script, or money due or payable to its stockholders as part of the earnings, *profits, income* or *gains* of such company, and all profits of such company carried to the account of any fund or used for construction shall be subject to and pay a duty of five per centum on the amount of all such interest * * * and a list or return shall be made and rendered to the assessor or assistant assessor in duplicate * * * and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation * * *.” Then follows the provision as to a penalty for failure on the part of the railroad or other named company to make the return or pay the tax, quoted in the opinion of Chief Justice Waite below.

Section 116 of this same act provides: “That there shall be levied, collected and paid annually upon the annual *gains, profits* or *income* of every person residing in the United States, or of every citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends or salaries, or from any profession, trade, employment or vocation, carried on in the United States or elsewhere or from any source whatsoever

except as hereinafter mentioned * * * a certain tax in proportion to the incomes.”

Section 119, the penalty of which it was attempted to apply to the railroad that had failed to pay the tax imposed by Section 122, *supra*, reads, “That the taxes on *income* herein imposed shall be levied on the first day of May, and be due and payable on the 30th day of June in each year until and including the year 1870, and no longer, and to any sum or sums annually due and unpaid for thirty days after the 30th day of June as aforesaid, and for ten days after demand therefor by the collector, there shall be levied in addition thereto the sum of ten per centum (later reduced to five per centum) on the amount of taxes unpaid as a penalty.”

SUPREME COURT REFUSED TO EXTEND PENALTY IN CASES LIKE THAT AT BAR.

Erskine vs. Railway (supra) held that this penalty of 10 per centum (afterwards reduced to 5 per centum) did not apply to a railroad in default under Section 122, despite the general language of Section 119 and the general language of Section 122, namely, “And in case of any default in making said list or return or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty shall be made *according to the provisions of law in other cases of neglect and refusal.*”

In *Elliott vs. Railway*, three other sections of the same act and acts amendatory thereof, namely, Sections 28, 11 and 8, were brought forward to sustain

a penalty of 5 per centum, but the Court denied the contention.

Section 8 is quickly dismissed in the opinion of Chief Justice Waite below. Section 28 provided "That each of said collectors shall * * * give notice by advertisement * * * that the said taxes have become due and payable, and state the time and place * * * at which he or his deputy will attend to receive the same and all persons who shall neglect to pay the duties and taxes so as aforesaid assessed within the time specified shall be liable to pay ten per centum (afterwards reduced to five per centum) additional upon the amount thereof."

Section 11 reads, "That all lists and returns required to be made monthly by any person, firm, company, corporation or party whatsoever liable to taxes shall be made * * * and all lists or returns required to be made quarterly and all other lists and returns for which no provision is otherwise made shall be made on or before the tenth day. * * * And in case said tax is not paid on or before the last day of every month the collector shall add one per centum thereto. * * * And in all cases of neglect to make such lists and returns or in case of false and fraudulent returns, the *provisions of existing laws as amended by this act shall be applicable thereto.*"

SUPREME COURT'S OPINION.

The foregoing is explanatory of the opinion of the Court by Mr. Chief Justice Waite in *Elliott vs. Railway*, 99 U. S., 573, in part, as follows:

“In *Erskine vs. R. R. Co.*, 94 U. S., 619, we decided that the only penalty to which a corporation was liable for default under Section 122 of the Internal Revenue Act of June 30, 1864, 13 Stat. at L., 284, as amended July 13, 1866, 14 Stat. at L., 138, was that of \$1,000 specially provided for in that section. We are now asked to review that ruling; but after a careful consideration of the elaborate arguments which have been submitted, we are satisfied that it was right. The language of the section to be construed is as follows: ‘And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of \$1,000; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect and refusal.’ In *Erskine’s* case we were asked to hold the company liable in case of default, for the penalty of five per cent and interest at the rate of one per cent a month, provided for in Section 119, as amended, 13 Stat. at L., 283; 14 Stat. at L., 480; but we decided that this provision applied only to cases of default in payment of the duties imposed by that section. The correctness of that ruling is now conceded; but it is claimed that the company is liable for a penalty of five per centum and interest at the rate of one per centum a month, under Section 28 of the Act of June 30, 1864, as amended July 13, 1866, 14 Stat. at L., 106; Section 11 of the Act of July 13, 1866, 14 Stat. at L., 150, and Section 8 of the Act of March 2, 1867, 14 Stat. at L., 473. The last-

named Act simply provides that when for a failure to pay a tax at the time and in the manner provided by law a penalty of ten per centum additional upon the amount of the tax so due and unpaid had been exacted, the person or persons so failing or neglecting to pay the tax, instead of paying ten per centum, should pay five per centum and interest at the rate of one per centum a month. The sections of the other Acts referred to were evidently intended to apply to taxes and duties included in the regular annual and monthly lists required by law to be made out and placed in the hands of collectors, and not to the taxes on interest and dividends collected through or from the corporations, under the provisions of Section 122. Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced. Full power is given in Section 122, by reference to the other provisions of the internal revenue law, for the collection of the tax and penalty there provided for; but it nowhere appears, by reference or otherwise, that it was the intention of Congress to add to the one penalty which is expressly given for the failure to do what this section requires. * * * We see nothing in the Act of July 14, 1870, 16 Stat. at L., 260, under which a portion of the taxes paid by the defendant in error was assessed, to manifest any intention on the part of Congress to add to the penalties imposed by Section 122 while that section was in force. The penalty of \$1,000 is confined to a default in making the required return, instead of default in making the return or in making the payment, as it was in Section 122. In other respects the

provisions as to penalties in the two Acts are substantially the same.

“The judgment is affirmed.”

IN CONCLUSION.

In conclusion, we contend that the general doctrine of the decisions of the Court of Appeals and the Supreme Court of the United States on the construction of statutes imposing taxation, and especially clauses imposing penalties (overruling or distinguishing earlier cases, as in *Eidman vs. Martinez*, 184 U. S., 583) has now become through repeated decisions uniform and invariable, not only that penal provisions are to be strictly construed, but that laws imposing duties and other taxes must be construed fairly towards the taxpayer and the obligation must be made out “in a clear and determinate manner from the language of the statute.”

TWENTY PER CENTUM PENALTY CANNOT BE EXTENDED BY IMPLICATION FROM PERSONAL PROPERTY TAX TO SPECIAL FRANCHISE TAX.

In the cases directly applicable to the case at bar, namely, *Erskine vs. Railway* and *Elliott vs. Railway*, *supra*, this doctrine is applied to an attempt like the present to impose by implication, or by an extension of general terms, a penalty in addition to that which the legislature has prescribed. There is no necessity in the present case for such an application of the penalty as might have been urged in the cases referred to; yet the Supreme Court held in those cases that such an application of penalty

could not be made. There is in the present case the same distinction between classes of taxation as in those cases, and the reason why a heavier penalty was required in regard to the return of individual incomes, over that required in the return of railroad earnings, obtains in the present case, as respects the returns of personal property, contrasted with the returns of gross earnings. The 20 per centum penalty, 20 per centum of the assessed value of the personal property not returned, can not be applied by implication or extension to the return of gross earnings of a public service corporation as the basis for a special franchise tax. The omission to make such return of gross earnings is punishable under Section 18 of this statute which furnishes a reasonable and adequate fine; but it would have more serious consequences under the “‘doom’ of the assessor,” that is, his power to make the assessment whatever he pleases if no return is made, utilizing such information as he may procure.

As the Supreme Court said in *United States vs. Kirby*, 7 Wall., 482: “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter.”

It seems to us clearly, “to lead to injustice and oppression and an absurd consequence,” to maintain, in this case, that a disproportionate penalty should

be applied to the return of gross earnings under a special franchise tax which is plainly applicable only to a return of personal property.

ONE PER CENTUM PENALTY ON PENALTY UN-
WARRANTED.

As to the 1 per centum penalty, a penalty on a penalty, and therefore illegal, it is also unwarranted in the present case because it is in terms a penalty for failure to pay the tax during the month of May and the whole amount of the tax was tendered to the Collector of Taxes within the month of May, as the demurrer admits. Therefore, on this count the demurrer must be overruled as counsel for the appellees would probably concede.

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COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT. 1 - 1912

Henry W. Stodgers -
Clk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1912.

No. 2442.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY,
A CORPORATION, APPELLANT,

vs.

DISTRICT OF COLUMBIA AND CHARLES C. ROGERS,
COLLECTOR OF TAXES OF THE DISTRICT OF COLUMBIA,
APPELLEES.

BRIEF FOR APPELLEES.

EDWARD H. THOMAS,
FRANCIS H. STEPHENS,
Attorneys for Appellees.

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APPELLEES.**

BRIEF FOR APPELLEES.

Statement of the Case.

The plaintiff in error, under the provisions of paragraph 5 of section 6 of the act of July 1, 1902 (the personal tax law, 32 Stat., 617), was required to file with the board of personal tax appraisers, on or before the first day of August, an affidavit as to the amount of its gross earnings for the preceding year ending the 30th of June, on which amount the said paragraph lays a tax of 4 per cent. The plaintiff

failed to file such affidavit on or before the 1st of August, 1910, and did not file the same until January 25, 1911, claiming that the failure to file the same was the result of inadvertence on the part of a subordinate official. The board of personal tax appraisers imposed the penalty of 20 per cent provided in paragraph 1 of the same section, because of the failure to make this affidavit. On May 29, 1911, the plaintiff tendered to the Collector of Taxes the sum of \$52,119.58, being 4 per cent on its gross earnings for the preceding year. As this amount did not include the penalty assessed against the company, the collector refused to accept it. With the penalty added, the amount due was \$62,543.50. This amount was not paid in the month of May, when by law the tax is payable, but was paid, with an added penalty of 1 per cent for the month's delay, on the 7th day of June, 1911.

The declaration is in two counts. The first claims the return of the penalties exacted, amounting to \$10,423.92, and the second claiming a recovery of the whole tax, claiming that the same was not properly assessed at all.

ARGUMENT.

Three questions arise upon the record, to wit:

First. Whether the penalty of 20 per cent prescribed by paragraph 1 of section 6 can be imposed for failure to make the affidavit required by paragraph 5 of said section 6.

Second. Whether the penalty of 1 per cent added to the original tax and the penalty imposed thereon, for failure to pay in the month of May, was proper because it included a penalty of 1 per cent upon a penalty of 20 per cent already imposed.

Three. Whether there is any defect in the assessment of the tax; and if so, is the irregularity sufficient to invalidate the whole tax.

I.

The penalty imposed by paragraph 1 of section 6 is applicable to all paragraphs of section 6, where other penalties are not specially imposed.

Prior to the passage of this act there was no valid personal tax law in the District of Columbia. This law for the first time imposed a franchise tax upon these companies, if the tax in question be franchise tax. The act in which this tax is found is the appropriation act of 1902, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1903, and for other purposes."

The first section of the act deals with the general subject of appropriations.

The second section provides a limit on requisitions upon appropriations that can be made by the Commissioners of the District of Columbia.

The third section relates to advances from the Treasury, costs of street extensions, repayments of advances, etc.

The fourth section provides for the arrangement of estimates.

Section 5 relates to taxation of real estate.

Section 6, which is divided into nineteen separate paragraphs, relates to the taxation of personal property.

The seventh section covers the subject of license taxes, and the eighth section is the repealing clause. The determination of the main question at issue involves a careful reading of section 6 of this act.

The first paragraph of section 6 deals with the board of assistant assessors, term of office, division in real estate, the excise board and the board of personal tax appraisers, the board of equalization, etc. In this paragraph is found the following provision (32 Stat., 617) :

“That hereafter the Assessor of the District of Columbia, or his successor in office, shall annually cause to be prepared a printed blank schedule of all tangible personal property and all general merchandise or stock in trade owned or held in trust or otherwise, subject to taxation under the provisions of this section, and of the classes of corporations and companies to be assessed, together with the rate of tax prescribed, to which shall be appended an affidavit in blank, setting forth that the foregoing presents a full and true statement of all such personal property, taxable capital, or other basis of assessment, or either, as the case may be. When said schedule is ready for delivery, notice thereof shall be given by the Assessor by advertisement for three successive secular days in one or more of the daily newspapers published in said District, and a copy of said schedule shall be delivered to any citizen applying therefor at the office of the Assessor. Every person, association, corporation, firm, or company in said District liable to taxation hereunder, and every association, company, executor, administrator, guardian or trustee, holding personal property in trust, liable to taxation hereunder shall, within thirty days after the last publication of said

advertisement, as aforesaid, fill out the proper blanks in said schedule with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof, as aforesaid, before the Assessor or one of the other members of said Board of Personal Tax Appraisers, and the members of the said board are hereby authorized to administer such and all oaths in connection with their duties as Assessor and Appraisers without charge, or before any person authorized by law to administer oaths; and the address in the District of Columbia of the person, corporation, or company making affidavit shall in each case be given below his, its or their signature, and thereupon said Board of Personal Tax Appraisers, or any one of the members thereof, shall assess said property at its fair cash value, and enter the same in the column upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation for the fiscal year beginning July first, nineteen hundred and two, and each fiscal year thereafter; *Provided*, That if any person, firm, association, corporation, company, administrator, executor, guardian or trustee shall fail to make and deliver to the Assessor or one of the said appraisers within thirty days after the date of the last advertisement of the notice hereinbefore required the schedule of his or its said personal property, owned, held in trust, or otherwise, as provided for in this section, then the said Board of Personal Tax Appraisers hereinbefore provided for shall without delay, from the best information they can procure, make an assessment against such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, to which they shall add twenty per centum thereof."

Then follows in the law the provision for reassessment in case of unsatisfactory returns, for appeals, and penalties for false returns.

Paragraph two of this section is as follows:

"On all tangible personal property, assessed at a fair cash value (over and above the exemptions pro-

vided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons and other vehicles, there shall be paid to the Collector of Taxes of the District of Columbia one and one-half per centum of the assessed value thereof."

Paragraph 3 provides for the taxation of general merchandise in the hands of dealers amended by the act of April 28, 1904 (33 Stat., 563).

Paragraph 4 provides for the tax upon hotels.

Paragraph 5 is as follows:

"Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers shall make affidavit to the Board of Personal Tax Appraisers on or before the first day of August each year as to the amount of its or their gross earnings, for the preceding year ending the thirtieth day of June, and shall pay to the Collector of Taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank and all other incorporated banks, and trust companies, respectively, six per centum; each gas company five per centum; each electric lighting and telephone company four per centum. And in addition thereto the real estate owned by each national or other incorporated bank, and each trust, gas, electric lighting and telephone company, in the District of Columbia shall be taxed as other real estate in said District: *Provided*, That street railway companies shall continue to pay the four per centum per annum on their gross receipts and other taxes as provided by existing law, and insurance companies shall continue to pay the one and one-half per centum on premium receipts, as provided by section six hundred and fifty of the Code of the District of Columbia. That so much of the act approved October first, eighteen hundred and ninety, entitled 'An act to provide for the incorporation of trust, loan, mortgage and

certain other corporations within the District of Columbia,' as is inconsistent with the provisions of this section is hereby repealed."

Paragraph 6 provides for the taxation of bonding companies, and is also amended by the act of April 28, 1904 (33 Stats., 563).

Paragraph 7 provides for the taxation of savings banks, and is amended by the same act above cited.

Paragraph 8 is as follows:

"Par. 8. The capital stock of all corporations, other than those herein provided for, organized in the District of Columbia or under the laws of any of the States or Territories of the United States chiefly for the purpose of and transacting business within the District of Columbia, except those exempted by the laws relating to the District of Columbia, shall be appraised in bulk at its fair cash value by the Board of Personal Tax Appraisers and the corporation issuing the same shall be liable for the tax thereon according to such value, and shall pay to the Collector of Taxes of the District of Columbia a sum equal to one and one-half per centum on the assessed valuation thereof; but from the assessed valuation of such capital stock shall first be deducted the value of any and all real estate owned by such corporation in said District, which real estate shall be separately taxed against said corporation; *Provided*, That nothing in this act contained shall be construed to include newspaper, real estate, and mercantile companies, which by reason of incorporation receive no special franchise or privilege; but all such corporations shall be rated assessed, and taxed as individuals conducting business in similar lines are rated, assessed and taxed."

This was also amended by the act of 1904, above cited, as follows:

"Section 6, proviso of paragraph 8, is hereby amended so as to read as follows:

“ ‘*Provided*, That nothing in this *paragraph* contained shall be construed to include business companies, which, by reason of or in addition to incorporation receive no special franchise or privilege; but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed’ ” (33 Stat., 563).

Paragraph 9 provides for a tax on building associations, since amended by reducing the tax from 4 per cent to 2 per cent upon gross earnings.

Paragraph 10 is an exemption clause.

Paragraph 11 describes the board of personal tax appeals, which by the act of 1904, above cited, is required to sit on the second Monday of February and the second Monday of March in each year.

Paragraph 12 empowers the collector of taxes to distrain for unpaid taxes. This is also amended by the act of 1904, above cited.

Paragraph 13 is as follows:

“Par. 13. That all taxes levied under the foregoing provisions of this section shall be due, payable, and collectible at the same time and times as the general tax on real estate in said District, and shall be subject to the same penalties for nonpayment thereof until distraint or sale as hereinbefore provided.”

It was under the provisions of this paragraph, adopting by reference the act of February 14, 1902 (32 Stat., 33), that a penalty of 1 per cent was imposed upon the plaintiff in error.

Paragraph 14 imposes the tax upon private banks.

Paragraph 15 imposes a tax upon general brokers.

Paragraph 16 imposes a tax upon note brokers.

Paragraph 17 defines the tax year of private banks, general brokers, and note brokers.

Paragraph 18 is as follows:

"PAR. 18. Any person or persons violating any of the provisions of this section shall be liable to a penalty of not exceeding five hundred dollars for each offense, said penalty to be imposed, upon conviction in the police court of the District of Columbia, as other fines and penalties are imposed, and said court is hereby invested with jurisdiction thereof; and in default of the payment of said penalty the person or persons so convicted shall be imprisoned, in the discretion of the court, not exceeding six months."

Paragraph 19 confers authority upon the Commissioners to employ clerks and makes an appropriation for salary, etc.

The argument made on behalf of the plaintiff in error, that the language of paragraph 1 of section 6 is not applicable to the special franchise tax imposed by paragraph 5, is not borne out by a reading of the first paragraph.

It is provided in the first paragraph that a printed blank schedule of all tangible personal property and all general merchandise and stock in trade shall be prepared by the assessor "*subject to taxation* under the provisions of this section." Even if the tax imposed in paragraph 5 is not imposed upon tangible personal property, it is, nevertheless, taxed by the provisions of this section, and, therefore, is covered specifically by the clause "subject to taxation under the provisions of this section." But the law says further, "and of the classes of corporations and companies to be assessed together with the rate of tax prescribed." This corporation does belong to the class of corporations assessed, and the rate of tax is prescribed, and it is covered again by the language of this paragraph, and the law continues—

"to which shall be appended an affidavit in blank setting forth that the foregoing presents a full and true statement of all such personal property, taxable capital or *other basis of assessment*, or either, as the case may be."

If tangible personal property only were subject to taxation under this section it would have been sufficient for the

lawmakers to have so stated with the use of the words "tangible personal property;" but they continue with a further enumeration of "tangible capital or other basis of assessment." Why should this provision so carefully made for some other tax than that upon "tangible personal property" have been made if the lawmakers had not in mind the taxation of some other matter, such as the special franchise mentioned in paragraph 5? Further the law provides: "every person, association, corporation, or company in said District *liable to taxation hereunder.*" The plaintiff in error is liable to taxation hereunder, and, therefore, is again covered by the language of paragraph 1.

All corporations are required to fill out the proper blanks in the schedule and sign an affidavit to the truth thereof, and the assessors then assess the property at its fair cash value and enter the same in the blanks provided for the purpose, "and the amount thus ascertained shall be entered upon the books for taxation." Further, it is provided that if this return is not made within thirty (30) days after the date of the last advertisement of the notice required "of his or its said personal property, owned, held in trust, or otherwise, *as provided for in this section*, then said board of personal tax appraisers, hereinbefore provided for, shall without delay make the assessment." Up to this point in the law no property has been taxed and no rate of taxation has been mentioned. General machinery is provided and general rules established; the details follow. In paragraph 2 the rate of one and one-half per cent ($1\frac{1}{2}\%$) is imposed on tangible personal property; in paragraph 3 the tax of dealers in general merchandise; paragraph 4 of hotel companies, and in paragraph 5 upon the companies which include the plaintiffs in error. The rate of taxation is fixed at 4 per cent, and the date for making the affidavit as to gross earnings is fixed for the 1st day of August. If the penalty imposed by paragraph 1 does not apply to paragraph 5, there is no reason why it should apply to paragraph 4, to paragraph 3,

to paragraph 2, or to any other paragraph in this section of the law. But it is plain that the penalty of paragraph 1 was provided for as a general penalty to insure the prompt return to the assessor of all taxable property, whether strictly personal property as such or special franchises, and that paragraph 5 merely modifies paragraph 1 as to the time when such information should be furnished to the assessor. If, on the other hand, it should be held that the penalty of 20 per centum provided for in paragraph 5 should not apply to the corporations enumerated in paragraph 5, but should apply to the other paragraphs of this section, then we should have the remarkable and anomalous situation of a class of corporations endowed by the Government with special and valuable franchises, paying very large sums of money to the Government as taxes under this law, exempt from a penalty provision which applies unquestionably to all other corporations, to all individuals, associations, and partnerships. The law thus worked out would be an absurdity. In fact, the principal cases which call for the enforcement of a penalty, and to which a penalty is principally applicable, would be without one. The argument that the penalty provided by paragraph 18, a fine of \$500 for failure to observe the law, would still be available to the District is of little force, as illustrated in the present instance where the District has recovered a fine of \$10,000. It is obvious that the imposition of a fine of \$500 would be entirely inadequate to the collection of a penalty of \$10,000.

It is suggested by the plaintiff in error in its brief, page 11, that the gross earnings could be readily ascertained from the annual reports made to Congress, and reference is had to 33 Statutes, 344, 345. The law referred to requires that the telephone company on or before the 15th of January in each year make a report of its receipts and expenditures for the preceding *calendar* year, dividing them into receipts and expenditures on account of capital as well as income and operation. It would be impossible for the assessor to ascer-

tain from such a report the amount of the gross earnings of the company, for the reason that the company is required to make a report of its gross earnings for the preceding *fiscal* year ending June 30th, and there would be six months for which the assessor would have no data, to wit, from January to June, inclusive, as to gross earnings, receipts, and expenditures, or any other matters. Moreover, it would require the assessor to make calculations for himself as to the amount of the gross earnings, when it is the obvious intention of the statute, and indeed is conceded by the plaintiff, that the company should make specific report as to them.

Every street railroad company is required to report under oath to Congress before the first day of February each year for the preceding year ending December 31 (act June 10, 1896, extending the routes of the Eckington & Soldiers' Home Railway Company and of the Belt Railway Company, 29 Stat., 320), such report to cover receipts, expenditures, dividends, etc.

The class of corporations enumerated in paragraph 5 have invariably, without exception, construed the law to require them to make a return on or before the 1st day of August in each year. This has also been the construction of the assessor, and no dissenting voice has been raised against this construction for a period of ten years, during which the law has been on the books, until the present suit. It is a matter of common knowledge among those connected with these corporations that the Washington Gas Light Company forgot to make its return in 1905 until the month of October, and instead of claiming that no penalty arose through such failure it applied to Congress for relief, and that relief was provided for in an act couched, necessarily, in general terms (34 Stats., 483).

Under this law the companies pay no personal taxes; the franchise tax mentioned in paragraph 5 and the real estate tax are paid, but no personal taxes have ever been exacted under this law. It will be noticed that under the provisions

of paragraph 1, above quoted, considerable attention is paid by the act to the affidavit attached to the schedule. It is the affidavit which states that the schedule is to contain "a full and true statement of all such personal property, taxable capital, or other basis of assessment, or either," and, further, it is required that every person, etc., shall "make and sign an affidavit to the truth thereof as aforesaid." The board of personal tax appraisers, and the members thereof, are authorized to administer oaths, and the address of the person shall be given below the signature in the affidavit. If any person shall make a false affidavit they shall be deemed guilty of perjury. .

By paragraph 5 banks, gas, electric lighting and telephone companies are required to make affidavit on or before the first day of August. There is nothing in this paragraph which says they shall not return the schedule required by paragraph 1, and as a matter of practice for ten years the companies have always returned their gross earnings upon the printed schedules printed by the assessor, and the return in this case was made upon such a schedule.

By paragraph 1 the schedule is to be returned within thirty days after the date of the advertisement that the schedule is ready. It will be noticed from the declaration that the advertisement was so made that the time expired on the first day of August, and this has been the practice of the assessor's office, *i. e.*, to have the time provided in paragraph 1 coterminous with the time provided in paragraph 5.

Paragraph 5 also speaks of street railroad companies and insurance companies, providing that they shall continue to pay taxes heretofore provided. There is nothing in paragraph 5 which requires them to make a return by the first of August, or which exempts them in any manner from operation of the provision in paragraph 1, and the invariable construction of the law, both by the District officers and these corporations, has been that these companies have complied with the requirements of paragraph 1.

There is an argument on behalf of the appellant, beginning on page 20 of its brief, that the corporations subject to penalty are corporations not possessing special franchises, and because this corporation has been granted a special franchise therefore the penalty does not apply, citing as a basis of this argument paragraph 8 (see Appellant's Brief, p. 26).

It is difficult to perceive where this argument leads. It is conceded that the appellant is subject to a tax, and the provisions of paragraph 8 exempt the corporations referred to in that *paragraph* as provided in the amendment, the original act providing that nothing in this *act* contained shall be construed to include newspaper, real estate, and mercantile companies which receive no special franchise. However, as this company does not come under paragraph 8 that paragraph can have no application.

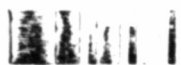
Neither is the penalty void because the assessors failed to assess the company "without delay, from the best information they can procure," as provided in paragraph 1. As a matter of fact, the assessors did, without delay, when they had procured the information, assess the company. That there was delay in getting the information may have been a matter of necessity. It would be an anomalous situation if the appellant company could escape the result of its own misdoing by showing that the public officials, who were in no wise concerned in the company's delinquency or responsible for it, were in some other matter also delinquent. The expression "without delay" is indefinite to a certain extent, and without doubt imposes some discretion upon the officials. It means that the public business should go forward. It does not grant any concession to the appellant by reason of its failure to do so, nor is any penalty imposed upon the assessors for failure to observe it. It is merely directory. If, however, the assessors were required to assess within a certain time after the failure to make a return the situation would be relieved by paragraph 11 of the statute.

“Provided, That in case the personal tax appraisers shall fail to complete any of the duties in this section to be by them performed within the time provided therefor, the taxation provided by this section shall not by reason thereof be invalid; but such appraisers shall proceed with all reasonable diligence to complete such duties, and their acts shall be valid as if performed within the time fixed therefor. If at any time within any current year property subject to taxation within the provisions of this section shall have been omitted from assessment, said board of personal tax appraisers shall immediately proceed to assess the same for the then current year, giving notice in writing to the persons or corporations so assessed, who shall have a right of appeal within ten days from the date of said notice.”

Construction.

The statutes, remedial as well as penal, are to be liberally construed.

Bank vs. Deering, 98 U. S., 29, 35.



Statutes enacted for the good of the public, although imposing penalties, are liberally construed.

U. S. vs. Stowell, 130 U. S., 12.

Statutes should be construed and in effect to both special and general intent of legislature, yet if irreconcilable the special prevails.

Platts vs. W. P. R., 99 U. S., 48.

Revenue laws have always been liberally construed.

11 U. S. Enc., 168.

Stuart vs. Maxwell, 16 Howard, 150, 161.

Repeals by implication of revenue laws are not favored.

U. S. vs. 67 Packages Dry-goods, 17 Howard, 85.

The results following from construction are sometimes conclusive as to the correct solution.

People vs. Rice, 16 L. R. A., 836-852.

That construction should be given which supports the statutes in all its parts and makes all parts harmonious.

R. R. vs. Dey, 12 L. R. A., 436, 445.

State vs. Bartley, 23 L. R. A., 67.

Little vs. Mitchell, 20 L. R. A., 306, 307.

R. R. vs. Backus, 18 L. R. A., 729-737.

Johnson vs. Schlosser, 36 L. R. A., 59, 63.

Where the sum demanded by a State statute for a license as a tax with provision for the punishment of one who pursues his profession without the license is a part of the revenue system of the State, and is a means merely of enforcing payment of the tax itself or for the penalty of not paying it. It is legally equivalent to a special action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor, and providing for its prosecution by information.

Royal vs. Virginia, 116 U. S., 572.

The contemporaneous and practical construction by those charged with the execution of the law is of great weight. The intention prevails.

11 U. S. Enc., 115, 138.

U. S. vs. Johnson, 124 U. S., 236.

Heath vs. Wallace, 138 U. S., 573.

Where the real design of the legislature, although not precisely expressed, is yet plain or perceivable or ascertainable with reasonable certainty, the language of the statute

must be given such construction as will carry that design into effect.

Brown vs. Barry, 3 Dal., 365, 367.

Binney vs. Canal Co., 8 Pet., 201, 212.

Northern Securities Co. vs. U. S., 193 U. S., 358.

Rogers vs. Peck, 196 U. S., 327; also 199 U. S., 425, 436.

There can be no tax without legislative authority, but statutes are to receive a reasonable construction to carry out the purpose and intent of the framers.

Scottish Union Ins. Co. vs. Bowland, 196 U. S., 611.

All the sections should be construed together.

Id., 629.

A construction which will produce inequality and injustice is to be avoided.

Knowlton vs. Moore, 178 U. S., 41, 77.

The Supreme Court of the United States gives some very notable instances of laws construed to affect the intention of Congress, even in the case of statutes plainly penal in their provisions.

The schooner "Butterfly" was held to be employed in the slave trade because it was equipped for that purpose, although she was captured before she reached the coast of Africa and had never had a slave on board.

U. S. vs. Morris, 14 Peters, 464, 475.

See also *Waters-Pierce Oil Co. vs. Deselms*, 212 U. S., 159, 172, 173.

U. S. vs. Coombs, 12 Pet., 72, 79, 83:

Theft of goods from stranded vessel above high-water mark was held punishable by the act of Congress of 1825, the claim being made that the theft took place within the

jurisdiction of a State and was not punishable by the Federal authorities. The court said, at page 80, "Where the words are general the courts are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs of the enactment."

In *Lake Co. vs. Rollins*, 130 U. S., 662, the court said that the object of consideration is to give effect to the intention of the framers. "At first glance its reading produces no impression of doubt. The meaning apparent on the face of the instrument must be accepted" (670). See also *The Emily* and *The Caroline*, 9 Wheaton, 381, 388, 389; *Lau Ow Bew vs. U. S.*, 144 U. S., 47, 51, 59, 63.

The cases of *Erskine vs. Railway*, 94 U. S., 619, and *Elliott vs. Railway*, 99 U. S., 573, relied upon by the plaintiff in error, do not seem applicable. Section 116 of the act there under review imposed a tax upon "the gains, profits, or income of *any person*" (13 Stat., 280), and upon the "gains, profits, and income," of every business, trade or profession "carried on by *persons*" (14 Stat., 478). The penalty was provided in section 119. Up to this point in these acts there was no indication of an intention to tax corporations. The tax on railroads, canals, etc., is found in section 122 (13 Stat., 284), and the penalty in the same section. The court held that the penalty provided in section 119 was not added to the penalty imposed in section 122, and that this construction was not defeated by other provisions of the acts of July 13, 1866 (14 Stat., 106, 150, 473).

Elliott vs. Railway, 99 U. S., 576.

II.

Was the penalty of one per cent, imposed upon the tax with twenty per cent added, illegal?

The statement is made by the counsel for the appellant that the amount exacted was illegal, at least to the extent of one per cent imposed upon the penalty of twenty per cent added to the tax of four per cent. The situation is this: The company failed to make its return by the first of August, and thereupon a penalty of twenty per cent was added to the tax. The tax was \$52,119.58; with a penalty of twenty per cent added it was \$62,543.50. With a penalty of one per cent imposed upon the company for the failure to pay the tax in May following it should in all events have been one per cent of the first-mentioned sum and not one per cent of the second-mentioned sum, that is to say (see second count of declaration), the penalty of one per cent was \$625.41. It should have been only \$521.19.

If the penalty was correctly imposed it became a part of the sum that was due in the following May and was payable in the month of May, just as the tax of four per cent was payable in that month, so the penalty of one per cent was necessarily laid upon the whole amount. The one was due just as much as the other. (See *Burgdorf vs. D. C.*, 7 Apps., 405.)

III.

Was the assessment irregular, and if so, was the irregularity such as to avoid the assessment?

Nothing much need be said upon this point. It was not considered important by the court below. By paragraph one the assessors are required to assess and enter the amount upon the books. Assessment is, of course, a mental process, and

the entry upon the books the physical manifestation of the mental process. Both were done as required, and there is no allegation in the second count that they were not. On the contrary, the allegation is that the entry was made (R., 5). In the appellant's brief, p. 48, it is said that if this was a special franchise tax no assessment was necessary. The appellant has already argued, p. 20 *et seq.*, that this is a special franchise tax. Therefore, according to the position of the appellant, no harm has been done to it on account of the manner of this assessment.

Appellant further argues, if this was not a special franchise tax (having already conceded that it was) the assessment was invalid because it did not "describe what property of the appellant was intended to be assessed or valued" (Brief, p. 48). There is no allegation of this kind, however, in the declaration. The latter concedes that there was an assessment of its gross earnings, for after describing the entry caused to be made by the personal tax appraisers it proceeds to allege—

"No other assessment of any tax against the plaintiff on account of its gross earnings or for any personal tax due by it * * * was made" (R., 5).

This is an admission that there was this one assessment on account of gross earnings and that there was no other. It is claimed that this assessment is illegal, but how or why is left to surmise.

But conceding for the sake of argument that there is some irregularity in the assessment, it is not for that reason void. In 2 Cooley on Taxation, p. 1488, it is said:

"In general an action can only be maintained when the following conditions are found to concur:

"1. The tax must have been illegal and void, and not merely irregular.

"2. The tax must have been paid under compulsion.

"3. The tax must have been paid over by the collecting officer to the use of the municipality."

The appellant concedes in this case that it is subject to the tax (Brief, p. 9), so it is concluded upon this branch of the argument.

The ruling below was correct and should be affirmed.

Respectfully submitted,

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